Bd. July 1931

IOWA LAW BULLETIN

Volume VII
1921-1922

INDEX

STATE UNIVERSITY OF IOWA
College of Law
IOWA CITY, IOWA

INDEX TO VOLUME VII OF THE IOWA LAW BULLETIN

LEADING ARTICLES

INDEX TO SUBJECTS IN VOLUME VII OF THE IOWA LAW BULLETIN

(The titles of articles and books are given in *italics*)

IOWA LAW BULLETIN

Volume VII NOVEMBER, 1921 Number 1

NOTICE TO THE GUARANTOR—IN IOWA[1]

The word "surety" in its broad meaning includes both the "surety" in the restricted sense and the "guarantor."[2] The distinction between the two, said Mr. Justice Beck,[3] is that "a guarantor becomes bound for the performance of a prior or collateral contract upon which the original principal is alone indebted; a surety is bound with the principal upon the contract under which the principal's indebtedness arises."

It is obvious that the word "prior" adds nothing in this connection, the whole problem being whether his obligation is collateral to the undertaking of the other, or whether both are promisors upon the same undertaking. In the latter event it is the primary obligation of both, while in the former, the one is promising to answer for the debt or default of another within the rules of the Statute of Frauds. But there are situations in which this distinction is not altogether clear. One who joins with another as co-maker of a bond for accommodation is a surety in the narrow sense. Yet if the purpose of the bond is to secure the performance of another obligation upon which only the other is liable, it has been held that, taking the transaction in its entirety, the position of the one is that of a guarantor rather than that of a surety.[4] The same may

[1]The noun expressing the contract between the guarantor and the guarantee, and also the corresponding verb, are each of them subject to two kinds of spelling, ending sometimes in "y" and at other times in "ee." Webster says that the form ending in "ee" is preferred by lawyers for the verb. But in BLACK'S LAW DICTIONARY it is said: "it seems better to use this word ["guarantee"] only as the correlative of 'guarantor', and to spell the verb, and also the name of the contract, 'guaranty.'" This has been repeated in substance in WORDS AND PHRASES.

[2]*The Singer Manufacturing Co.* v. *Littler* (1881), 56 Iowa 601, 604, 9 N. W. 905; *Conger & Michael* v. *Babbett* (1885), 67 Iowa 13, 24 N. W. 569.

[3]*The Singer Manufacturing Co.* v. *Littler* (1881), 56 Iowa 601, 9 N. W. 905.

[4]*Ibid.*

be true of the accommodation co-maker of a note. On the instrument itself his position is that of a surety. Yet if the note is given to secure the performance of an obligation owing only by the one, such other has been spoken of as a guarantor.[5]

The importance of these considerations lies in the fact that while the failure to give notice is sometimes available as a defense to a guarantor, the rule is that the surety in the narrow sense does not stand in like position.[6] One who joins another in the making of a note for accommodation, for example, is not entitled to notice by the payee that the note has been accepted and the money advanced to the principal, or that the obligation is in default. This is implied in *The Singer Manufacturing Co.* v. *Littler*,[7] which counsel attempted to distinguish from *Davis Sewing Machine Co.* v. *Mills*[8] on the ground that the defendant in the latter was a guarantor, while in the former he was a surety. The Court, by taking the trouble to show that the defendant in the former case was, as it says, really a guarantor, indicates that it would recognize the force of the distinction if that were not true.

It is submitted that if in certain transactions the situation of the surety bears such a resemblance to that of a guarantor that he should have certain benefits generally conceded to the latter only, it would be better to accomplish this result by recognizing an exception to the general rule as to sureties, rather than by calling such a surety a guarantor. But whatever our phraseology, the important consideration is that a person whose position is that of a strict surety on the written instrument itself may be entitled to some of the notices now to be considered.

Notice of Acceptance of the Undertaking

The different views

The consideration of the Iowa law upon this subject will be aided by a very brief survey of the different rules that prevail elsewhere. Subject to certain variations, which for the most part will be touched upon in the discussion of our own decisions, there are two

[5] *Banker's Iowa State Bank* v. *Mason Hand Lathe Co.* (1903), 121 Iowa 570, 90 N. W. 612, 97 N. W. 70 (the accommodation party was an indorser in this case).

[6] *Courtis* v. *Dennis* (1884), 7 Met. 510, 519.

[7] (1881), 56 Iowa 601, 9 N. W. 905.

[8] (1881), 55 Iowa 543, 8 N. W. 356.

general views on the subject of the requirement of notice to the guarantor that his undertaking has been accepted, although in terminology there appear to be three.

The original rule, as given in the famous English case of *Somersall* v. *Barneby* in 1611,[9] was that no notice was necessary because the guarantor "at his peril ought to take notice thereof." This has been followed in certain states such as New York where in one case it was said:[10]

"The defendant invited the plaintiffs to sell goods to Steel & Wall, on his promise to guaranty the payment of the debt. The plaintiffs assented, and delivered the goods. The proposition of one party was accepted by the other; and according to our notions of the law this made a complete contract.....and there is no principle upon which we can hold that notice was an essential element of the contract."

But some courts have held that this is not in every case the whole story. *Babcock* v. *Bryant*[11] was a suit on a guaranty of payment of all goods delivered by the plaintiff to one Case, during the year. The plaintiff had delivered goods to Case but had given no notice to the defendant. The actual holding is that where the defendant's obligation is of such an uncertain nature as this, notice and request for payment are conditions precedent to the right to maintain an action against him. The Court is talking rather of notice of default than of notice of acceptance of the guaranty, but there is some language in the opinion pointing towards a duty to give notice of the latter kind. In a later case[12] it was said to be "the settled law of Massachusetts, that, as a general rule, in order to maintain an action against a guarantor of a future contingent event, notice that the guaranty has become operative must be given in a reasonable time to the guarantor." As the plaintiff had not given such notice within a reasonable time, he had "by his own laches" "barred his right of action." The best statement of this rule is to be found in *Bishop* v. *Eaton*[13] in which it is said of the undertaking:

"It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to

---

[9] Croke, James, 287.

[10] *Smith* v. *Dann* (1844), 6 Hill 543, 544.

[11] (1831), 12 Pick. (Mass.) 133.

[12] *Whiting* v. *Stacy* (1860), 15 Gray 270.

[13] (1894), 161 Mass. 496, 499, 500, 37 N. E. 665, 42 A. S. R. 437.

notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance.....In accordance with these principles it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration."

Without doubt this is what was in the mind of Chief Justice Marshall when, years before, he suggested by way of dictum in *Russell* v. *Clark's Executors*,[14] that if the transaction there involved had amounted to a guaranty "it would certainly have been the duty of the Plaintiff to have given immediate notice to the Defendants of the extent of his engagements." The same may be said of his similar dictum in *Edmondston* v. *Drake and Mitchell*.[15] Certainly there can be no question that this is the holding of *Douglass* v. *Reynolds*[16] in which it was held error to refuse to instruct the jury "that to entitle the plaintiffs to recover on said letter of guarantee, they must prove that notice had been given, in a reasonable time after said letter of guarantee had been accepted by them, to the defendants that the same had been accepted." This decision was approved in *Lee* v. *Dick*[17] in which the Court adds:[18]

"When the guarantee is prospective, and to attach upon future transactions; and the guarantor uninformed whether his guarantee has been accepted and acted upon or not, the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable."

The necessity of giving such notice was also emphasized in *Adams* v. *Jones*,[19] and in *Reynolds* v. *Douglass*,[20] but in none of these cases is there any indication that this notice is anything other than a duty which the guarantee owes to the guarantor within a reasonable time after the contract has been formed by his acceptance of the offer. But in the *Louisville Manufacturing Company* v.

---

[14](1812), 7 Cranch 69, 91, 3 L. Ed. 271.

[15](1831), 5 Peters 624, 637, 8 L. Ed. 251.

[16](1833), 7 Peters 113, 8 L. Ed. 626. The instruction is given on page 119 and the decision that its refusal was error, on page 125.

[17](1836), 10 Peters 482, 9 L. Ed. 503.

[18]*Ibid.*, p. 496.

[19](1838), 12 Peters 207, 213.

[20](1838), 12 Peters 497, 505, 9 L. Ed. 1171.

Welch[21] Mr. Justice Nelson made the remarkable statement that such notice "is deemed essential to an inception of the contract." And many years later, in delivering the opinion of the Court in *Davis* v. *Wells*,[22] Mr. Justice Matthews said:[23]

"There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule, inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor.

"The former is the sense in which the rule is to be understood as having been applied in the decisions of this court."

In support of this he quotes from Mr. Justice Nelson's opinion in *Louisville Manufacturing Company* v. *Welch*,[24] emphasizing the sentence quoted above by placing it in italics.

Thus the rule of the Supreme Court of the United States appears to be that the office of the notice of acceptance in guaranty contracts is to constitute the real acceptance of the offer.

This points towards the existence of three distinct rules upon the subject: (1) that no notice of acceptance is necessary; (2) that at least in certain instances notice of acceptance must be given within a reasonable time after the contract has been formed (by performance of the act called for) to satisfy a condition implied in the offer;[25] (3) that in certain instances notice is necessary to the "inception of the contract," being the very acceptance itself.[26]

Two Rules Only

That there is more than one rule upon the subject is beyond question, in view of the fact that some jurisdictions follow the de-

[21] (1850), 10 Howard 461, 475, 13 L. Ed. 497.

[22] (1881), 104 U. S. 159, 26 L. Ed. 686.

[23] *Ibid.*, 164.

[24] (1850), 10 Howard 461, 13 L. Ed. 497.

[25] "In such a case it is implied in the offer, that to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made." *Bishop* v. *Eaton* (1894), 161 Mass. 496, 500, 37 N. E. 665, 42 A. S. R. 437.

[26] See a note in 2 Cornell L. Quart. 329, in which these are given as three distinct rules.

cision of the early English case[27] that notice is not necessary,[28] while "more commonly notice is held requisite"[29] at least under certain circumstances. But, as has been shown by Professor Williston,[30] the apparent existence of these separate rules as to the requirement of notice has arisen because of the failure to distinguish the reason for the necessity of notice in such a case "from that requiring acceptance of an offer of a bilateral contract."

Thus there is no dispute that there is more than one rule upon this subject and that one of such rules is that no notice of acceptance is necessary. In order to test whether the decisions present two rules in addition to this, or only one, it will be helpful to eliminate every case in which the decision will be the same regardless of what is held to be the function of the notice of acceptance At the start we may leave out of consideration all cases from jurisdictions that do not require notice of acceptance. We may also eliminate all cases in which this notice to the guarantor was duly given, for he will be liable whichever theory we adopt as to the office of such notice. On the other hand, if due notice was not given in a jurisdiction in which it is required, and nothing else appears in the case to change the result, the guarantor will not be liable under either theory, so that every such decision may be disregarded for the purposes of the present inquiry.

There remain (1) those cases in which due notice was not given, yet in which for some other reason the guarantor is held liable, that is, those cases that are exceptions to the rule that notice of acceptance is necessary, and (2) those cases in which the guarantor seeks to revoke his offer after it has been acted upon by the guarantee but before notice of acceptance has been given. By these cases, and by these only, may we determine whether the function of notice of acceptance to the guarantor is an element in the formation of the contract, or a condition subsequent implied in the offer, and thereby imported into the contract, so that while the guaranty contract is created, the failure to give notice prevents the existence of a liability for non-performance, or in other words prevents the existence of any cause of action under the existing contract. But even some of these exceptions are not particularly helpful in this inquiry and will be mentioned only in connection with the excep-

[27] *Somersall* v. *Barneby* (1611), Cro. Jac. 287.
[28] 1 WILLISTON ON CONTRACTS 119 and his note 13.
[29] *Ibid.*, 119 and his note 14.
[30] *Ibid.*, 120.

tions to the rule in Iowa, although they are not peculiar to this jurisdiction.

Decisive, however, are those cases in which the exception depends upon the fact of knowledge or of waiver and those in which there is the attempted later revocation, all of which cases demonstrate the fallacy of the notion that the notice is necessary in order to constitute an acceptance of the offer to guaranty. Viewing the requirement of notice, where it exists, as a condition, to inform the guarantor that the contract has been completed, it is logical to hold that he cannot escape liability for lack of notice if he has actual knowledge of the facts. But if the office of the notice is to accept the offer, and it has not been given, the most complete knowledge that the guarantor can have on the subject is that the contract has not been completed and hence that he is not liable. In view of these facts, the statement that in such transactions "knowledge, no matter how acquired, is held to be notice, and it may be inferred from facts and circumstances warranting such a conclusion,"[31] indicates clearly that the notice is a "condition" and not an "acceptance."

The same result

"is shown by the fact that if notice is not given within a reasonable time, the guarantor may waive his defense and incur liability by a subsequent promise to pay, or the necessity of notice may be waived in the offer. If an element necessary for the formation of a contract had been omitted, this result could not be reached. No subsequent gratuitous promise can vitalize an agreement which never became a contract."[32]

As to revocation, Professor Williston has pointed out[33] that if the notice of acceptance was a necessary element in the creation of the contract, "the offeror might revoke his offer after performance of the act requested, but prior to notification. Such a result would be unjust, and is required neither by the necessities of the case nor the authorities." The contract is complete on the performance of the act but there is a condition that if notice of the performance of the act is not given within a reasonable time by the promisee, the promisor is not to be liable.

---

[31] *German Savings Bank* v. *Roofing Co.* (1900), 112 Iowa 184, 191, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335.

[32] 1 WILLISTON ON CONTRACTS 122.

[33] *Ibid.*, 118.

The Rule in Iowa

So great has been the confusion in the cases as to the reason for requiring notice of acceptance of the guaranty and the true function of such notice, that it is not surprising that some of this confusion has crept into the Iowa decisions. Leaving the full history of the Iowa cases in this regard to the notes,[34] it is sufficient to say here that our decisions have held that this notice of acceptance is required in certain situations, but there is no holding that it is necessary to the inception of the contract. All of our cases can be squared with the sound theory that the performance of the act called for by the offer of guaranty completes the contract, and that the notice of acceptance, where required, is a condition implied in the offer, that the guarantor is not to be liable unless notified within a reasonable time that his offer has been accepted and acted upon.[35]

But not in all transactions of guaranty does Iowa[36] require this notice of acceptance. The Court has stated repeatedly[37] that no notice of acceptance is necessary in case of an "absolute guaranty." No argument is required to establish the proposition that no guaranty can be "absolute" unless there has been an appropriate offer which has been turned into a contract of guaranty by acceptance and which is not subject to conditions. Where these facts exist no notice of acceptance can possibly be required, so the statement is a truism. An interesting modification of this statement is found in *McKee* v. *Needles*[38] to the effect that "notice of acceptance of an absolute guaranty of an existing indebtedness is not necessary." The presence of the word "absolute" makes this also a truism. But as the Court was purporting to express a rule, we may strike

---

[34]Because of its length the discussion contained in this note, No. 34, is placed for convenience at the end of the article.

[35]See preceding note.

[36]As suggested above the Iowa rules and exceptions on this point are not peculiar to it; but this discussion is limited to the Iowa cases except where some special reason makes desirable the consideration of other decisions.

[37]*Carman* v. *Elledge* (1875), 40 Iowa 409, 410; *Case* v. *Howard* (1875), 41 Iowa 479, 480; *German Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 188, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335; *State Bank* v. *Hand Lathe Company* (1903), 121 Iowa 570, 577, 90 N. W. 612, 97 N. W. 70.

[38](1904), 123 Iowa 195, 198, 98 N. W. 618.

out this word and have left the suggestion that it is important whether the obligation to be guarantied is existent or prospective. The indebtedness in this case was a hotel bill for services previously rendered, the guaranty being offered in order that the proprietor would permit a guest to depart with his baggage without the enforcement of the innkeeper's lien. The decision was that no notice of acceptance was necessary.

This emphasizes the distinction made by Mr. Justice Deemer[39] between *Carman* v. *Elledge*[40] and *Case* v. *Howard*.[41] In *Carman* v. *Elledge* the indebtedness was for the price of a cow which had been sold previously, the purpose of the guaranty being to secure delivery to the purchaser. In *Case* v. *Howard* the indebtedness was the price of a case of tobacco which was to be sold on the strength of the guaranty. In spite of a statement in the opinion that "the guaranty in this case was absolute," Mr. Justice Deemer correctly insists[42] that the decision is that no notice was necessary because the guarantor had actual knowledge of the sale, indicating that notice would have been necessary in the absence of such knowledge because the indebtedness to be guarantied was prospective.

The decision of the *German Savings Bank* case[43] is that the guarantee was not entitled to recover because the obligation was prospective and no notice of acceptance was given to the guarantor, nor was he shown to have knowledge of the facts. Although the offer in this case had reference to a series of future transactions, no emphasis is placed upon this fact, but only upon the fact that the obligation was to be incurred after the guaranty was given. This is entirely sound because if an offer is made to guaranty repayment of money to be advanced to another, the importance of notice of acceptance should in no way depend upon the number of transactions contemplated. Whether any further notice is required where several transactions are involved will be considered presently.

In *State Bank* v. *Hand Lathe Company*,[44] we find the suggestion that even in the event of an offer to guaranty a prospective obliga-

---

[39] In *German Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 190, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335.

[40] (1875), 40 Iowa 409.

[41] (1875), 41 Iowa 479.

[42] See note 34.

[43] *German Savings Bank* v. *Drake Roofing Co.* (1900), 112 Iowa 184, 190, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335.

[44] (1903), 121 Iowa 570, 90 N. W. 612, 97 N. W. 70.

tion no notice of acceptance is required if the offer contains a limit on the amount which is to be guarantied. But the case is not an authority for that rule because the defendant's liability there depended upon his indorsement of a negotiable instrument and not upon a guaranty.[45] Nor does such rule prevail in Iowa. For in the *German Savings Bank* case[46] it was held that the guarantor was not liable in the absence of notice of acceptance of his offer to guaranty a future obligation, although his offer expressly provided that his liability was "not to exceed the sum of $500."[47]

In view of the fact that the cases apply a different rule as to notice of acceptance, depending upon whether the offer is to guaranty a prospective obligation on the one hand, or an existing indebtedness on the other, the inquiry arises as to whether this distinction is based upon any sound reason. There is ground to believe that the distinction arose out of the notion that a guaranty of an existing indebtedness would, as a matter of fact, necessarily involve "some consideration distinct from the advance to the principal debtor, passing directly from the guarantee to the guarantor."[48] Where such consideration exists it is in itself sufficient notice to the guarantor that the contract has been completed. But the interesting feature is that in the two leading Iowa cases on guaranty of an existing indebtedness[49] the consideration did not pass to the guarantor. New consideration is necessary in such instances, it is true, but in both of these cases this new consideration passed from the guarantee to the principal debtor, being in the form of the delivery to him of a chattel previously sold, in the one case[50] and the release of his goods from an innkeeper's lien in the other.[51] Ordinarily it will be just as improbable that the performance of such acts for the benefit of the debtor will come to the attention of the guarantor, as that he will learn of an original obligation

---

[45] See note 34.

[46] *German Savings Bank* v. *Drake Roofing Co.* (1900), 112 Iowa 184, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335.

[47] *Ibid.*, page 185.

[48] *Davis* v. *Wells* (1881), 104 U. S. 159, 165, 26 L. Ed. 686. After the quotation given in the text the Court says: "In the case of the guaranty of an existing debt, such a consideration is necessary to support the undertaking as a binding obligation."

[49] *Carman* v. *Elledge* (1875), 40 Iowa 409—see note 34; *McKee* v. *Needles* (1904), 123 Iowa 195, 98 N. W. 618.

[50] *Carman* v. *Elledge, supra.*

[51] *McKee* v. *Needles, supra.*

created upon the strength of the offer. Since this is true, and since the rule requiring notice of acceptance to the guarantor requires it only in certain instances, namely, where "the act [of acceptance] is of such a kind that knowledge of it will not quickly come to the promisor,"[52] there is no sound basis for the distinction. Where the obligation to be guarantied is in existence at the time of the offer to guaranty, some further consideration will be necessary to support the promise, and it may often be true that this further consideration will be a benefit moving to the guarantor. Where such is the fact the receipt of this consideration by the guarantor is sufficient notice to him that his offer to guaranty has been acted upon, and no other notice is required. But where the new consideration supporting the offer to guaranty an existing indebtedness is a detriment to the guarantee and does not move to the guarantor, the giving of such consideration is not of itself notice to him. Furthermore, if the obligation to be guarantied is prospective, while the creation of that obligation alone will be consideration for the promise of guaranty, it is possible for the guarantor to stipulate for additional consideration which shall be a benefit to him. If this is done, the receipt by him of this consideration—or rather this part of the consideration—notifies him that his offer has been accepted, being itself the acceptance of that part of his offer, and no further notice is required, since he knows that the offeree would not pay money, for example, for the guaranty of an obligation if no such obligation was in existence. But although supported by no sound reason the distinction exists and as a result thereof the Iowa rule is that notice of acceptance is required in case of an offer to guaranty a prospective obligation, but not of an offer to guaranty an existing indebtedness.[53]

[52] *Bishop* v. *Eaton* (1894), 161 Mass. 496, 37 N. E. 665, 42 A. S. R. 437.

[53] The result of this distinction is that in an offer to guaranty a prospective obligation there is implied a condition that notice of acceptance shall be given within a reasonable time after the offer has been acted upon, while no such condition is implied in an offer to guaranty an existing indebtedness. With this as a starting point we may say that an unconditional offer of guaranty requires no notice of acceptance. This is the result we obtain if we substitute the words "unconditional offer of guaranty" in the place of the words "absolute guaranty" in the Iowa opinions [see note 37]. In view of the actual development of our law on the subject, this may be just the thought that the court was seeking to express. But as this requires explanation of what we mean by an unconditional offer of guaranty, it is preferable to state the Iowa rule as given in the text.

Exceptions to the Rule

The foregoing rule might be stated as a rule with an exception, either in the form that the rule is that no notice is required except where the obligation is prospective, or that notice is necessary except where the indebtedness exists when the offer is made. But to classify either of such exceptions with the others that exist would be unnecessarily confusing.

The "rule" as stated is either two rules joined together for convenience of statement, or it is a rule consisting of two parts. It will be helpful to separate the two parts and to refer to them as distinct rules in discussing the exceptions thereto. To the rule that no notice of acceptance is required if the offer is to guaranty an existing indebtedness there is no exception other than the general one that he who makes an offer may embody therein a requirement of notice of acceptance. But the exceptions to the other rule are not so simple. The starting point is that actual knowledge of the facts will take the place of notice.[54] But this invites inquiry as to what facts must be known. Is it sufficient that he know that the obligation called for has been created, or must he know in addition to this that the obligation was created on the strength of his offer of guaranty? That he need know only that the obligation called for has been created is the answer of *Case* v. *Howard*[55] in which the guarantor was held liable without notice of acceptance, although he had been told falsely by the principal that the purchase on credit was secured without the use of the guaranty.[56]

The following explanation is submitted. If the obligation that the guarantor offered to guaranty has been created, there is so great a probability that this was done on the strength of the guaranty, that if the guarantor knows the first fact, he must assume the second unless he finds out otherwise from the promisee.

There is one situation, in which the necessity of notice is obviated, that is sometimes spoken of as a separate exception[57] al-

---

[54] *Case* v. *Howard* (1875), 41 Iowa 479. See also the dictum in German *Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335, that "knowledge, no matter how acquired, is held to be notice, and it may be inferred from facts and circumstances warranting such a conclusion."

[55] (1875), 41 Iowa 479.

[56] See Note 34.

[57] See *Davis* v. *Wells* (1881), 104 U. S. 159, 26 L. Ed. 686.

though it is in truth but a specific application of the "knowledge" exception. This situation is found where the contract of guaranty and the transaction guarantied are both completed at the same time and in the presence of all the parties.[58]

Another situation which is sometimes referred to as an exception to the rule requiring notice, exists where the guarantor receives a consideration moving to him, as distinguished from the consideration moving to the principal.[59] It would seem better to say that the receipt of this consideration is notice, rather than that it dispenses with notice, but the idea is that it obviates the necessity of any other or special notice to the effect that the obligation has been created on the strength of the offer to guaranty. But analysis of this matter will show that no other or special notice is required for the reason that the guarantor has knowledge of the fact that his offer has been accepted.

There are, however, exceptions that are quite distinct from that of knowledge by the guarantor. The defense which is created in favor of the guarantor of a prospective obligation if he has had no notice of acceptance within a reasonable time, is one which he may waive if later he receives notice or knowledge,[60] or may waive in advance at the time the offer is made.[61] A peculiar application of the latter exception is suggested in the *German Savings Bank* case.[62] The suggestion is that the notice of acceptance is not required "if the receipt from him [the guarantee] of a valuable consideration, however small, is acknowledged in the guaranty [offer to guaranty]." The actual receipt of money or other benefit by the guarantor from the guarantee would give him actual knowledge that his offer had been accepted, but this is not true of a bare recital of the receipt of consideration. However, although the ordinary offer to guaranty a prospective obligation contains an implied condition requiring notice of acceptance within a reasonable time, it is quite logical to exclude such an implied condition from an offer that

[58] *German Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335 (dictum).

[59] *Ibid.*

[60] *Farwell* v. *Sully* (1874), 38 Iowa 387.

[61] *Davis Sewing Machine Company* v. *Mills* (1881), 55 Iowa 543, 8 N. W. 356; *Shores, Mueller and Company* v. *Knox* (1913), 160 Iowa 340, 141 N. W. 948.

[62] (1900), 112 Iowa 184, 188, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335.

contains a recital of the receipt of consideration from the guarantee, because such a recital indicates that the transaction is settled as far as the guarantor is concerned, almost as much as if he had included an express waiver of the requirement of notice.

The final exception is that this notice need not be given "if the guaranty is signed by the guarantor at the request of the other party" [the guarantee].[63] This seems to have been regarded as an inevitable conclusion.[64] But that is not true. If the "request of the other party" was a definite offer, so that the promise of the guarantor would constitute an acceptance, the resulting contract would be a contract to guaranty instead of a guaranty, in much the same way that a contract to sell differs from a sale. Since we are concerned here with the guaranty of prospective obligations, the guaranty could not come into existence until the transaction contemplated by it had been performed. Just as a "seller" frequently has authority to convert a contract to sell into a sale by the appropriation of goods to the contract, so usually the "guarantee" would have authority to perform the transaction to be secured and thus transform the contract to guaranty into a guaranty. That is, he would have authority from the guarantor. But A's promise to sell goods to B in return for C's promise to guaranty payment would place B under no obligation to make the purchase, and hence could mean no more than that A would hold himself ready to sell. So the obligation is still prospective and may never come into existence. If the request for a guaranty amounted to less than an offer, as well it might, the uncertainty of the completion of the transaction is a little more pronounced. But we are faced again with the fact of "great probability." When the promise to guaranty is given in response to a request from the guarantee, whether that request amounts to an offer or not, the probability that the promise of the guarantor will result in a binding obligation is sufficiently great so that it is consistent to hold that notice of acceptance is not required. It may be added that this rule is in accord with the trend of decisions of other jurisdic-

[63] Dictum in *German Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 188, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335, quoting from *Machine Company* v. *Richards* (1885), 115 U. S. 524, 6 Sup. Ct. Rep. 173, 29 L. Ed. 480.

[64] *Ibid.* See also *Davis* v. *Wells* (1881), 104 U. S. 159, 26 L. Ed. 686.

[65] See STEARNS ON SURETYSHIP, page 84 b and the cases cited in his note 67 b.

tions,[65] which also may be said of the rule as to an offer of guaranty containing a recital of the receipt of consideration.[66]

We may sum up the exceptions in this way. (1) To the rule that no notice of acceptance is required if the offer is to guaranty an existing indebtedness, the exception is that notice is required if expressly called for in the offer. (2) To the rule that notice is required if the offer is to guaranty a prospective obligation, the exceptions are: (a) That notice is not required if the guarantor has knowledge of the fact that the obligation to be secured has been created, which includes (u) all situations in which the primary obligation and the guaranty are completed at the same time and in the presence of all the parties, and (v) all situations in which the guarantor actually has received from the guarantee consideration moving to the guarantor (meaning that in such instances no other or special notice is required), but it (w) is not dependent upon the guarantor's knowledge of the fact that the obligation was entered into upon the strength of his guaranty; (b) the requirement of notice may be waived (x) after the defense has arisen, or (y) before that, even in the original offer of guaranty—with which statement must be included (z) the fact that the incorporation of a recital of the receipt of consideration in the guaranty is given the force of a waiver of notice of acceptance; (c) no notice of acceptance is required if the guaranty is signed at the request of the guarantee.

It is necessary to add only that just as one offering to guaranty a prospective obligation may waive the requirement of notice, he may on the other hand, require more than mere notice of acceptance as, for instance, by stipulating that the undertaking, if completed, shall take a certain form.[67]

---

[66] *Ibid.*, and the cases cited in his note 67 c.

[67] In *Scribner, Burroughs and Company* v. *Rutherford* (1885), 65 Iowa 551, 22 N. W. 670, the offer was in these words: "*Scribner, Burroughs & Co.:* A. P. Kenyon wants a little money; if you want any one on the note, I will fix it when I come in. R. B. Rutherford." It is obvious that this offer cannot be accepted by merely advancing the money to Kenyon. On the other hand it is so worded as to authorize the company to act upon it by advancing the money to Kenyon upon his note, and requesting the defendant's signature thereon afterwards, since the offer calls for two acts—the advancement of the money and the request for Rutherford's signature to the note, without requiring that either should precede the other. He could have stipulated in his offer that his signature be secured before the money was advanced. As the court says of the offer he made,

Intermediate Notices[68]

If the purpose of notice of acceptance of an offer to guaranty a prospective obligation was to accept the offer, such notice would be required for each one of a series of contemplated transactions, because the acceptance as to each one of the series would complete the contract to that extent only, leaving the offer open as to the remainder. But since the function of this notice is merely to inform the guarantor that his offer has been acted upon, and there is such "great probability" that it will be acted upon in full, if at all, it is consistent with the other rules on the subject to hold that the guarantee is not bound to give notice to the guarantor of each separate transaction. Where the offer expresses a limit of the amount to which the guaranty is to extend, it is reasonable to say that the original notice that the offer is being acted upon is sufficient, which rule is the one announced in *German Savings Bank* v. *Drake Roofing Company*.[69] But "when a guaranty is continuing, and is unlimited in amount, and the amount for which the guarantor may be held responsible is subject to change, notice of advancements made and of the amount due when all the transactions are closed is generally held to be necessary."[70] It should be added, however, that since the only requirement is that the notice shall be given "in a reasonable time"[71] it should follow as

---

"he did not undertake by the letter to bind himself to pay the money, or to become in any manner responsible for the loan, except as he should be bound by the note to which he undertook to become a party."

[68]This expression, employed in *Louisville Manufacturing Company* v. *Welch* (1850), 10 Howard 461, 475, 13 L. Ed. 497, very appropriately describes those notices that are required after the original notice of acceptance and before the notice of default.

[69](1900), 112 Iowa 184, 192, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335. The suggestion here is that the expression of a limit in the offer of guaranty amounts to a waiver of subsequent notices of advancements made.

[70]*Ibid.* This was dictum only in this case, for the offer was limited. The same rule was implied in *The First National Bank of Dubuque* v. *Carpenter, Stibbs and Company* (1875), 41 Iowa 518, since the answer of the court to the argument that there was no notice of the several transactions was that as the jury found that the guarantor had knowledge of the facts, they must "of necessity" have found that he had knowledge of all the transactions.

[71]1 Williston on Contracts 119; *Whiting* v. *Stacy* (1860), 15 Gray (Mass.) 270; *Bishop v. Eaton* (1894), 161 Mass. 496, 500, 37 N. E. 665, 42 A. S. R. 437.

a matter of course that if the transactions are frequent and numerous, a statement of accounts given at seasonable intervals will suffice and that a separate notice of each transaction is not indispensable.

What has been said will apply to guaranties of advances of money or credit. But the offer of guaranty is sometimes of a different nature, the undertaking being that the guarantee shall not suffer loss from a relation entered into between the guarantee and a third person[72] as for example where such guarantee employs a third person as an agent[73] or enters into a partnership with him.[74]

---

[72]In *Davis Sewing Machine Company* v. *Mills* (1881), 55 Iowa 543, 8 N. W. 356; and in *The Singer Manufacturing Company* v. *Littler* (1881), 56 Iowa 601, 9 N. W. 905, the guaranty was that an agent employed by the plaintiff would faithfully perform his duties and account for all sums coming into his hands by virtue of this relation. In the first of these cases the lower court had given an instruction that the "defendants would be discharged from all liability under the contract" unless a certain notice had been given; but the members of the Supreme Court were divided as to whether the notice required by the instruction was notice of the principal's default, or notice "within a reasonable time after all transactions were closed, of the extent of their liability." The Court held that the instruction was correct on either theory, saying of this one [page 544]: "In cases where the guaranty is a continuing one, and the parties must have understood the liability thereunder would be increased and diminished from time to time and the guaranty uncertain as to when it would cease to be binding on guarantor, and when the party indemnified has the power at pleasure to annul and put an end to the contract guaranteed without the knowledge of the guarantor, we think the better rule is that the guarantor should have notice within a reasonable time after the transactions under the contract guaranteed are closed of the amount of his liability thereunder, to the end that he may, with the use of reasonable diligence, secure himself from loss." This rule was re-affirmed in the second case. In this case the defendants were sureties on a bond given by Littler to secure the plaintiffs against loss that might accrue by the appointment of an agent. Because of this, counsel attempted to distinguish this case from the first on the ground that the defendant was a guarantor in the first case while the defendants were sureties in this one. The Court holds that the defendants were not sureties but guarantors. As suggested early in the text it would have been better to have said that they held a position so far analogous to that of guarantors that they were entitled to this notice, rather than to call them guarantors. But it clearly establishes the rule that such a party to a bond is entitled to this notice.

[73]See preceding note.

[74]*Courtis* v. *Dennis* (1844), 7 Met. (Mass.) 510.

The rule in such cases is that the guarantor is entitled to notice, within a reasonable time after the relation is terminated, of the amount of his liability under the guaranty "to the end that he may, with the use of reasonable diligence, secure himself from loss."[75] This is not a notice of default, because he is entitled to this notice even if the principal is not in default at the time of the termination of the relation, as will be the situation if he is given a period of credit after that time.[76]

Thus the rules as to intermediate notices are these: (1) an offer to guaranty a series of future transactions (a) requires no intermediate notices if it limits the amount to be guarantied, but (b) if the offer is unlimited in amount the guarantor is entitled (x) to reasonable notices from time to time of the state of accounts, which will include (y) a statement of the final liability within a reasonable time after the series of transactions has been completed; (2) an offer to guaranty that the promisee shall not suffer loss from a relation entered into between himself and a third person imposes upon the guarantee who accepts such offer the duty to give an intermediate notice to the guarantor within a reasonable time after the relation is brought to an end, if credit has been given to the principal beyond that time. (If the principal is in default when the relation ends the notice will be a notice of default rather than an "intermediate notice").

Here, also, it may be added, that whatever the offer of guaranty may be, it may contain express stipulations for intermediate notices that otherwise would not be required.[77]

---

[75] *Davis Sewing Machine Company* v. *Mills* (1881), 55 Iowa 543, 544, 8 N. W. 356. See also *The Singer Manufacturing Company* v. *Littler* (1881), 56 Iowa 601, 9 N. W. 905.

[76] This distinction was brought out very clearly in *Davis Sewing Machine Company* v. *Mills* (1881), 55 Iowa 543, 8 N. W. 356, as shown in note 71, and also in the case of *Courtis* v. *Dennis* (1844), 7 Metc. (Mass.) 510, in which the Court said that the adjustment of the concerns of the company might be such that the principal would not be in default for some time to come, yet the notice is required within a reasonable time after this adjustment.

[77] See *Zalesky* v. *Fidelity Company* (1916), 176 Iowa 267, 157 N. W. 858, in which the guarantor stipulated for notice upon discovery "of any act or omission on the part of the principal.....that might involve a loss." The Court held that the guarantee had "discovered" no such act or omission in this case.

Exceptions to the Rules of Intermediate Notices

(1) To the rule that no intermediate notices are required to a guarantor of a series of future transactions who has limited the extent of his undertaking, the exception is that he may in his offer expressly stipulate for any such notices that he desires. (2) To the rules that intermediate notices are required if the guaranty applies to a series of future transactions and is unlimited in amount or if the guaranty is against loss arising out of a relation, the exceptions are: (a) that notice is not required if the guarantor has knowledge of the facts;[78] (b) the requirement of such notices may be waived either (x) in the original offer or (y) subsequently; and (c) the omission of such notices seems to be excused where they would be of no benefit to the guarantor.[79]

Notice of Default

Notice of the default of the principal might conceivably be required to serve either or both of two distinct purposes: (1) as a condition precedent to the guarantee's right to maintain suit against the guarantor; (2) as a requirement that might result in a defense on the part of the guarantor if not given within a reasonable time after default even if such notice did precede the filing of the action. Where the guaranty is definite as to time and amount there is little reason for requiring such notice as a condition precedent to suit;[80] but where it is indefinite in these respects there is good ground to argue that the creditor should give notice to the guarantor and demand payment from him before proceeding against him in court. This result has been reached in Massachusetts.[81] But in Iowa such notice is not a condition precedent to the right

---

[78] *The First National Bank of Dubuque* v. *Carpenter Stibbs and Company* (1875), 41 Iowa 518.

[79] *German Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 192, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335. This is dictum here because the guaranty was limited.

[80] See *Hengerford* v. *O'Brien* (1887), 37 Minn. 306, 34 N. W. 161, in which it was held that "the non-payment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand."

[81] *Babcock* v. *Bryant* (1831), 12 Pick. 133.

to sue[82] even if the guaranty is uncertain as to time[83] or as to amount[84] or both.[85]

It does not follow from this, however, that the guarantee may safely neglect to notify the guarantor of the default of the principal, for such a failure may constitute a defense to the cause of action even though it is not a bar to the suit itself. Hence our inquiry must extend further. In 1624 it was said in the English case of *Brookbank* v. *Taylor*[86] that it was not necessary to allege that notice was given to the guarantor that the principal had not paid, because the guarantor "at his peril ought to take cognizance of the non-payment and pay the rent, otherwise the promise is broke." More is stated in this reason than is required for the decision, because a holding that the plaintiff's complaint need not allege notice of non-payment would not be inconsistent with a rule that the failure to give such notice is available to the guarantor as a defense. But the prevailing rule both in England and in this

---

[82]*Henderson* v. *Booth* (1860), 11 Iowa 212; *The Second National Bank of Rockford* v. *Gaylord* (1872), 34 Iowa 246; *Chaflin* v. *Reese* (1880), 54 Iowa 544, 6 N. W. 729; *Martyn* v. *Lamar* (1888), 75 Iowa 235, 39 N. W. 285; *McKee* v. *Needles* (1904), 123 Iowa 195, 98 N. W. 618.

[83]*Claflin* v. *Reese* (1880), 54 Iowa 544, 6 N. W. 729. The guarantor of a mortgage, which provided that the debt should become at once due and payable in case of default in the payment of certain taxes, was held subject to suit without notice although the obligation matured prior to the date of the note, because of such default by the principal. Code 3056 provides that "no cause of action shall accrue upon a contract for labor or the payment or delivery of property other than money, where the time of performance is not fixed, until a demand of performance has been made upon the maker and refused, or a reasonable time for performance thereafter allowed." Thus a demand upon the principal is a condition precedent to suit on such undertakings. The rule as to the guarantor seems not to be affected thereby, but the interpretation of this statute might be so broad as to require notice to the guarantor of such an obligation as a condition precedent to the right to sue him.

[84]In *Davis Machine Company* v. *Mills* (1881), 55 Iowa 543, 8 N. W. 356, the guarantor was held not liable. But the pains taken by the Court to show that "the jury were warranted under the evidence in finding a reasonable time had elapsed after the transactions had closed before the commencement of this action" evidences that they view this failure not as a bar to the suit but as a defense to the cause of action, for the indication is clear that it would have been sufficient for the plaintiff to have commenced his proceedings in court within that "reasonable time." The obligation was indefinite both as to time and as to amount.

[85]*Ibid.*

[86]Cro. Jac. 685.

country seems to support the law as stated in the "reason" given,[87] where the amount of the obligation and the date of maturity are known to the guarantor.

And this is the law in Iowa. In *McKee* v. *Needles*[88] it is said that "notice of non-payment of the indebtedness by Sherman [the principal] was wholly unnecessary, as the contract was an absolute guaranty of payment of the sum named at a specified time."[89] But if the obligation guarantied is not certain as to amount and as to maturity the rule is that the failure to give notice of default of the principal is available as a defense to the guarantor[90] to the extent of the prejudice he has suffered thereby.[91]

The mere fact that this notice was given to the guarantor will not preclude this defense unless it was given within a reasonable time after default.[92] This means a reasonable time under all the facts of each particular case,[93] except that if notice of default is

---

[87]See STEARNS ON SURETYSHIP §§ 67 and 68.

[88](1904), 123 Iowa 195, 198, 98 N. W. 618.

[89]See *Peck* v. *Frink* (1859), 10 Iowa 193, which distinguishes a guaranty of collection from a guaranty of payment.

[90]*Davis Sewing Machine Company* v. *Mills* (1881), 55 Iowa 543, 8 N. W. 356. The Court was uncertain whether the instruction of the lower court meant that the guarantor was excused because of the failure to give him an intermediate notice at the close of the guaranteed relation, or because of the failure to give him notice of default, but held that the instruction was correct on either theory.

[91]*Shores-Mueller Company* v. *Knox* (1913), 160 Iowa 340, 141 N. W. 948. See especially page 345. The guarantor was allowed a counterclaim for damages caused by the failure to notify him of the default of the principal in a reasonable time. The judgment in this respect was reversed in the Supreme Court for two reasons: first, because there was no evidence that the delay in giving such notice was unreasonable; second, because there was no evidence that the guarantor suffered in any way from the lack of notice. This rule is stated *obiter* in *Fear* v. *Dunlap* (1848), 1 G. Greene 331; *Marvin* v. *Adamson* (1860), 11 Iowa 371; *Sabine* v. *Harris* (1861), 12 Iowa 87; *The Second National Bank* v. *Gaylord* (1872), 34 Iowa 246; *Claflin* v. *Reese* (1880), 54 Iowa 544, 6 N. W. 729; *Martyn* v. *Lamar* (1888), 75 Iowa 235, 39 N. W. 235. See also *Rodabaugh* v. *Pitkin* (1877), 46 Iowa 544.

[92]*Shores-Mueller Company* v. *Knox* (1913), 160 Iowa 340, 141 N. W. 948; *Second National Bank of Rockford* v. *Gaylord* (1872), 34 Iowa 246.

[93]*Greene Company* v. *Thompson* (1871), 33 Iowa 293, 294.

expressly stipulated for, the offer may specify the time within which it must be given.[94]

Thus the rule as to notice of default is that it is not required if the obligation is definite as to time and amount, whereas if the guarantor does not know in advance the extent of the obligation or the date of its maturity he is entitled to notice if the principal defaults. It may be that the law would be more in accord with modern business practice if such notice were required in both kinds of situations, but it must be admitted that there is a marked distinction between the two, which is sufficient to support the difference in the results.

Exceptions to the Rule of Notice of Default

Here again we have a "rule" that is either composed of two parts, or is two rules stated together for conciseness. And again it will be convenient to separate the two parts and to refer to them as separate rules in discussing the exceptions thereto. (1) To the rule that notice of default is not necessary if the obligation guarantied is certain as to time and amount, the exception is that such notice is required if expressly called for in the offer. (2) To the rule that notice of default is required if the obligation guarantied is uncertain as to time or amount the exceptions are: (a) This notice is not necessary where the guarantor has knowledge of the facts;[95] (b) it may be waived either (x) after the defense has arisen[96] or (y) in the offer of guaranty[97] but if such a clause is inserted in a guaranty prepared by the guarantee, the waiver must

---

[94] *Van Buren County* v. *Surety Company* (1908), 137 Iowa 490, 115 N. W. 24. But since the default here consisted of fraud of the principal it was held that the 10-day period agreed upon did not begin to run until the guarantee knew of the fraud or was chargeable with such knowledge.

[95] There is no detriment arising from the failure in such instances.

[96] *Farwell* v. *Sully* (1874), 38 Iowa 387.

[97] *Star Wagon Company* v. *Sweezy, Lebo and Company* (1879), 52 Iowa 391, 3 N. W. 421; *ibid.* (1882), 59 Iowa 609, 13 N. W. 749; *ibid.* (1884), 63 Iowa 520, 19 N. W. 298; *Hoyt* v. *Quint* (1898), 105 Iowa 443, 75 N. W. 342.

be stated in no uncertain terms;[98] (c) the omission of such notice is excused where it would be of no benefit to the guarantor.[99]

Effect of the Failure to Give a Required Notice to the Guarantor

As pointed out in the discussion of notice of default, the defense arising from a failure to give this notice is limited to the detriment suffered by the guarantor because of such omission, but the defense based on the failure to give notice of acceptance, where such notice is required, is complete without reference to the question of prejudice.[100] This was decided in the *German Savings Bank* case in which the guarantor was held not bound by the guaranty because he had no notice or knowledge of its acceptance, notwithstanding the fact that such notice would have been of no benefit to him in view of the fact that the principal was insolvent at the time the offer of guaranty was made and acted upon.[101] The same case suggests that the failure to give intermediate notices is excused where there has been no resulting detriment to the guarantor. If this is

[98] *Shores-Mueller Company* v. *Knox* (1913), 160 Iowa 340, 141 N. W. 948. It was held that "waiving acceptance and all notice," though poorly worded, waives notice of acceptance, but it is intimated that it does not waive notice of default, since, having been prepared by the guarantee, it will be construed against him where doubtful.

[99] While there may be some question whether it is proper to say that the omission of an intermediate notice is excused where the notice would be of no benefit to the guarantor, for the reason that it is not wholly clear that this defense is limited to the extent of the resulting damage, there is no such doubt in regard to the notice of default.

[100] It has been suggested (1 Williston on Contracts 123) that the guarantor is not discharged by the omission of this notice if he has not been injured thereby. But the Iowa case cited in support of this position (*German Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335) while suggesting this rule as to the intermediate notices, holds that the guarantor is not bound because of the failure to give him notice of acceptance, although "the Drake Roofing Company was insolvent from the time of the making of the guaranty down to the commencement of this suit."

[101] See the preceding note. Compare *Beebe* v. *Dudley* (1853), 26 N. H. 249, 59 Am. Dec. 341, in which it was held that notice of acceptance was not required for the reason that the guarantor suffered no prejudice since the principal became insolvent in a short time after the guaranty was acted upon and hence the guarantor had "not been prejudiced by want of notice" (this case is also cited in 1 Williston on Contracts 123, and supports the rule announced there).

true it should follow that the defense extends only to the amount of the prejudice, if some prejudice has been occasioned by the omission of such notices, and such is probably the Iowa law upon this subject.

The Burden of Proof

The burden of proof in cases involving notice to the guarantor requires special consideration only in those instances in which the defense depends upon detriment resulting from the want of notice. And this consideration is necessary only by reason of the peculiar history of the Iowa law upon this matter. Prior to the enactment of the Negotiable Instruments Law in 1902,[102] the statutory provision[103] in this State was that the blank indorsement of an instrument by one not a payee, indorsee or assignee thereof, constituted a guaranty. It was also provided that, to charge such a guarantor, one of two things was necessary: either that he be given notice of non-payment within a reasonable time, or that it be affirmatively shown that he received no detriment from the want thereof.[104] Decisions under this legislation led writers to believe that there existed in Iowa some peculiar rule as to the burden of proof in the guaranty cases, depending upon whether the guarantor was a stranger to the instrument or was a party to the chain of title.[105] The fact

[102] 29 G. A. Ch. 130.

[103] Sections 953 to 955 of the Code of 1851, which formed sections 1800 to 1802 of the Revision of 1860, sections 2089 to 2091 of the Code of 1873 and sections 3265 to 3267 of McClain's Annotated Code of 1888, were written as a single section in the Code of 1897, namely 3049, which read as follows:

"The blank indorsement of an instrument for the payment of money, property or labor by a person not a payee, indorsee or assignee thereof, shall be a guarantee of the performance of the contract. To charge such guarantor, notice of non-payment by the principal must be given within a reasonable time, but the guarantor is chargeable without notice, if the holder shows affirmatively that he has received no detriment from the want thereof. A guarantor as contemplated in this section is also liable to the action of an indorsee, assignee or payee, if due diligence in the institution and prosecution of an action against the maker or his representative has been used."

[104] If the last sentence of the statute quoted in the preceding note is more than a specific statement of a situation in which no detriment results to the guarantor, it presents a problem that is not important in our present consideration.

[105] See Ames Cases on Suretyship, page 240, note 1, and Stearns on Suretyship, § 67 and note 72.

that this diversity rested wholly upon the fact that an irregular indorser was by statute declared to be a guarantor, for whom there was provided by the same enactment a rule different from that applicable to guarantors in general, seems to have escaped attention. As this statute has been repealed[106] it is unnecessary to discuss the cases decided under it[107] other than to point out that the rule that in some instances one called a "guarantor" was entitled to require the plaintiff to plead and affirmatively to prove that no prejudice resulted from the failure to give notice of default within a reasonable time, has passed out of existence with the statute that created it.

The case of *Fear* v. *Dunlap*,[108] decided before the enactment of the legislation referred to, held that such an indorser "incurs whatever liability he assumes; that of guarantor surety, original maker, or second indorser" and that the holder has the right to fill up the blank indorsement accordingly.[109] This rule was not revived by the repeal of the statute which replaced it, because at the time of this repeal it was enacted that such a person is "liable as an indorser" in accordance with the rules there stated.[110]

Thus no exception now remains to the rule that where a notice has been omitted which constitutes a defense in favor of the guarantor to the extent of the detriment occasioned thereby, the burden rests upon the guarantor to establish that he has been prejudiced in this way and the extent thereof.

---

[106]39 G. A. ch. 130, 197.

[107]*Knight* v. *Dinsmore* (1861), 12 Iowa 35; *Picket* v. *Hawes* (1862), 14 Iowa 460; *The Mount Pleasant Branch of the State Bank* v. *McLeran* (1868), 26 Iowa 306; *Rodabaugh* v. *Pitkin* (1877), 46 Iowa 544. See also the following cases in which the defendant, not being an irregular indorser, was held not entitled to require the plaintiff affirmatively to show that no prejudice had been caused by the failure to give notice of non-payment within a reasonable time: *Peddicord and Wyman* v. *Whitham* (1859), 9 Iowa 471; *Peck* v. *Frink* (1859), 10 Iowa 193; *Marvin* v. *Adamson* (1860), 11 Iowa 371; *Sabine* v. *Harris* (1861), 12 Iowa 87; *Griffin* v. *Seymore* (1863), 15 Iowa 30; *Green and Company* v. *Thompson* (1871), 33 Iowa 293; *The Second National Bank of Rockford* v. *Gaylord* (1872), 34 Iowa 246; *Martyn* v. *Lamar* (1888), 75 Iowa 235, 39 N. W. 285.

[108](1848), 1 G. Greene 331.

[109]It was held that the presumption is strong that he is a commercial indorser, but if he assumes the liability of a guarantor "he is not relieved from liabilities, unless he prove that, for want of demand and notice, he has been injured, and then will only be discharged in an amount equal to such injury" (page 335).

[110]Code Supp. Section 3060-a 64. See also 3060-a 63.

Conclusion

Of three distinct types, then, are the notices to which a guarantor may possibly be entitled. And notwithstanding the different rules and exceptions that may save the case if it gets into court, the sound advice for counsel to give to his client is that prompt notice should be given to the guarantor of the acceptance of the guaranty and of any default of the principal; also, if the guaranty is to secure a series of future transactions, notice should be given of the several advancements as made, or at least frequent statements of the account should be sent; while if the guaranty is to protect the promisee from loss arising out of a relation entered into between him and a third person, the guarantor should have prompt notice of the extent of the obligation, if any exists at the termination of that relation, whether the principal be in default at that time or not.

Rollin M. Perkins

"As early as 1852 the problem of notice of acceptance to the guarantor had been suggested in *Crittenden* v. *Steele*, 3 G. Greene 538. The defendant had written to the plaintiff: "Mr. H. Crittenden—Dear Sir: Mr. O. Jones wishes to purchase some paper on short time. If you will fill this order I will be responsible. William Steele." The plaintiff, having furnished the paper and later brought suit against the defendant, was met with the defense that there had been no notice of acceptance. The Court disposed of the case by saying that the undertaking of the defendant was primary and not collateral—that is, it was not a guaranty. In *Case* v. *Luse* (1870), 28 Iowa 527, the Court holds that there was no guaranty for the reason that the defendant's letter did not contain a promise to be bound.

The first Iowa case of importance on this subject is Farwell v. Sully (1874), 38 Iowa 387. The defendant had written to the plaintiffs in behalf of one Playter, offering that if the plaintiffs would "open a credit with him" the defendant would "guarantee that all he may owe you on the first day of January next will be paid on that day." Several weeks later Playter became bankrupt, and then the defendant received his first notice from the plaintiffs informing him that the plaintiffs were holding him on the guaranty. The defendant wrote back: "Prove up your claim in bankruptcy and draw dividends. I will make my guarantee good." But when sued on the guaranty he sought to avoid liability on the ground that "the plaintiffs did not, at the time of selling the goods, notify him of his acceptance of the guaranty." [He also defended on another ground not material to this discussion and which also was held not to be a good defense]. The Court's disposition of the matter was "that whatever force there might be in the ground of defense that plaintiffs did not notify defendant, at or before the time of selling the goods, that they accepted said guaranty, it is entirely obviated by his reply to

their letter of June 21st, 1871. In this letter he recognizes the guarantee as an existing obligation, and promises to make it good." Thus while this decision leaves open the question as to whether the guarantee owed a duty to notify the guarantor within a reasonable time after the acceptance, that the offer had been accepted, it leaves no doubt on the other problem. As pointed out in the text, a defense based upon the failure to perform a condition may be waived, but a defense based upon the fact that an offer was not accepted cannot be lost in such a way. To repeat the words of Professor Williston: "No subsequent gratuitous promise can vitalize an agreement which never became a contract" [1 WILLISTON ON CONTRACTS 122]. If the plaintiff had let several weeks and the bankruptcy of Playter intervene before he accepted the offer of the defendant, it would have been then too late to do so. Nor does the Court consider the defendant's second letter as a new offer, because they say that "the reasonable construction of this language is, that it recognizes an existing, fixed liability upon his guarantee, because of what had already transpired." Thus the theory clearly is that the performance of the act called for by the defendant's offer of guaranty, brought the contract into existence.

The question of whether any notice of acceptance is required in guaranty contracts was presented in three different aspects, in as many cases, decided in the following year (1875). In the first of these, *Carman* v. *Elledge* (1875), 40 Iowa 409, the defendant's offer was to "sign the note with Gilbert Hampton" if the plaintiff would deliver to Hampton a cow previously sold by the plaintiff to Hampton. After this offer had been accepted by the plaintiff, a refusal by the defendant to sign the note would have amounted to a breach, regardless of whether the instrument had reached maturity or not. This being true his promise was really not collateral. Furthermore, his offer did not contemplate that he would sign as a guarantor, but rather as a co-maker with Hampton. Hence there is no way in which we can properly read a guaranty into these facts. Nor does the Court hold that it is a guaranty, the language being that "if it be conceded that the writing sued upon is but a guaranty" etc. Yet on the rule as to the necessity of notice of acceptance of guaranty contracts, no Iowa case has been cited more frequently than this one. In view of this fact a further consideration of the case is desirable. The Court, after conceding it to be a guaranty for the sake of argument, disposes of the defense that no notice of acceptance was given to the guarantor, by saying that this "is such an absolute and complete guaranty as renders notice of its acceptance unnecessary. There is a well recognized distinction between an offer or proposition to guarantee and a direct promise of guarantee. The former requires notice of acceptance and acting upon it, while the latter does not."

As to this statement, it must be said that there can be no sound "distinction between an offer or proposition to guarantee and a direct promise of guarantee" except that which differentiates such an offer that has not been accepted from one that has. But it is quite apparent that the Court had something else in mind, the idea seeming to be that an offer

looking towards the formation of a guaranty might be such as to require notice of acceptance, but that this would not be true of an offer which contained a "direct promise to guarantee." That an offer to guaranty an existing indebtedness does not require notice of acceptance is made clear, but what kinds of offers would require such notice is left entirely open. It is not impossible that the Court was thinking of the rule laid down in a Massachusetts case a few years before, *Whiting* v. *Stacy* (1860), 15 Gray 270, that "in order to maintain an action against a guarantor of a future contingent event, notice that the guaranty has become operative must be given in a reasonable time to the guarantor."

The offer involved in *Case* v. *Howard* (1875), 41 Iowa 479, the second of the series in 1875, was to guaranty, not an existing indebtedness, but one to be created after the offer was received, the act called for being the sale of a case of tobacco to one Hills. The same defense being raised, called forth the statement that: "in *Carman* v. *Elledge*, 40 Iowa, 409, we held that where the guaranty is absolute notice of acceptance is not necessary. The guaranty in this case is absolute." The greater part of the opinion, however, is devoted to pointing out that the defendant had actual knowledge of the fact that the tobacco had been sold to Hills. But this was the limit of his knowledge in this respect, for Hills had represented to him falsely that the purchase had been secured without the use of the guaranty. [This was alleged by the defendant in his answer and hence must be taken as true for the purpose of this decision which affirmed a judgment sustaining the plaintiff's demurrer to the answer]. That is, defendant knew that the sale had been made, but did not know that it had been made in reliance upon his offer of guaranty.

In the third of this series of decisions, *Bank* v. *Carpenter* (1875), 41 Iowa 518, there is presented a situation in which notice of acceptance was required. The decision affirmed a judgment for the plaintiff on the ground (as to this point) that there was sufficient evidence to justify the jury in finding that the defendants had notice or knowledge of the fact that their offer of guaranty was being acted upon by the plaintiffs. If no such notice was required, the instruction by the lower court was harmless error in favor of the losing party, hence the case is not strong as authority for the proposition that such notice is necessary. But that the Court considers it to be necessary is evidenced not only by its failure to criticise an instruction to that effect together with the pains it takes to justify the giving of the instruction, but also by its statement that "while the guaranty is a continuous one, the notice is also continuous."

The offer in this case called for a series of transactions to be performed from time to time in the future. Here, as in *Farwell* v. *Sully, supra*, it is clear that the theory of such notice is that it is a condition subsequent to acceptance, and not an element essential to the inception of the contract, for what defendants had was not notice from the plaintiffs but actual knowledge of the situation, which could do away with the necessity of notice if it is a condition but not if it is the acceptance of the contract itself.

The next Iowa case to be considered on this point is *German Savings Bank* v. *Drake Roofing Company* (1900), 112 Iowa 184, 83 N. W. 960, 51 L. R. A. 758, 84 A. S. R. 335, which also decided that notice of acceptance is necessary where the offer is to guaranty a series of future transactions. The facts were that a company desiring credit at the bank, had its secretary take a guaranty of "all notes, checks, drafts, overdrafts..... not to exceed the sum of $500" to the defendants who signed it. The secretary took the guaranty, so signed, to the bank, which accepted it and on the strength thereof, gave credit to the company. When sued upon the guaranty the defendants pleaded that no notice of the acceptance of the guaranty had been given them. A judgment for the plaintiffs was reversed, the Court saying through Mr. Justice Deemer [at page 186]: "When the guaranty is a letter of credit, or an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the decided weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty." This looks like a clear recognition of the sound theory that the office of this notice is to fulfill a condition implied in the offer. But in the same paragraph, speaking of the reasons for the rule, he says: "The first is that the so-called guaranty is a mere offer or proposition, and is not complete until the party making the offer is notified of its acceptance, when the minds of the parties meet, and the contract is completed." In support of this proposition he cites first the cases of the Supreme Court of the United States, quoted in the text, including *Davis* v. *Wells*. In another place [at page 189] he says: "the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract." This is obvious enough. When the transaction arises by an offer on the part of the guarantor it does not become binding until it has been accepted by the guarantee. But further on he adds: "the instrument was in legal effect, a mere offer of guaranty, requiring notice of acceptance to bind the guarantors," thus suggesting that this kind of an offer can be accepted only by a notice to that effect to the promisor. In support of this proposition he cites *Farwell* v. *Sully, supra,* which, as we have seen, is based upon the theory that notice is not necessary to the inception of the contract, while leaving open the question of whether any such notice is required. In fact the learned justice seems to have had in mind no distinction between the two theories as to the function of this notice, because after the language quoted he adds [page 191]: "the notice need not be in any particular form, nor need it come from the guarantee himself. Knowledge, no matter how acquired, is held to be notice, and it may be inferred from the facts and circumstances warranting such a conclusion." In support of this he cites not only *Bank* v. *Carpenter, supra,* but also *Bishop* v. *Eaton* (1894), 161 Mass. 496, 37 N. E. 665, 42 A. S. R. 437, in which it is clearly shown that the notice is not for the purpose of creating the contract, but to inform the promisor that a contract has been completed. Moreover, we have here again the

proposition that if notice is necessary to the inception of the contract, no knowledge obtained indirectly from third persons could be a substitute therefor. Thus the important facts of the case are these: (1) the decision of this case, reversing a judgment for the plaintiff, is required by a holding that notice is necessary under the facts involved, whether such notice be considered as an element essential to the inception of the contract or as a condition subsequent to the formation of the agreement; (2) the decision is that the defendant is not liable if he did not have notice, but the opinion does not make clear which theory is relied upon by the Court; (3) the Court cites with approval *Farwell* v. *Sully* and *Bank* v. *Carpenter,* in each of which the decision necessarily involves the theory that the notice is not necessary to the inception of the contract. Because of these facts, the *German Savings Bank Case* is authority only for the rule that an offer to guaranty a series of future transactions imposes upon the guarantee the duty of giving notice to the guarantor that his undertaking is being acted upon, leaving the rule, as it was before, that the notice is not necessary to the inception of the contract, but must be given within a reasonable time after acceptance. Whether or not notice must be given after each transaction is considered in another place.

The decision in *State Bank* v. *Hand Lathe Company* (1903), 121 Iowa 570, 90 N. W. 612, 97 N. W. 70, did not tend to clarify the Iowa law upon this subject. The facts in this case were that a company, wishing to borrow money from the bank, executed its note for $3,000.00 to W. E. Mason, who indorsed it for accommodation and mailed it to the bank with the statement: "I wish to deposit this as security for any obligation that may be due, or that hereafter may become due, by J. F. Mason, as manager of the said Hand Lathe Co." The original opinion by Chief Justice Ladd involves no difficulties. But on a petition for a rehearing, counsel urged that defendant was really a guarantor only, and hence was not liable because no notice of acceptance had been given him. In the supplemental opinion, *per curiam*, the theory on which judgment for the plaintiff is affirmed is rather obscure. The Court says: "It is true that a mere offer or proposal of guaranty requires notice of acceptance. *German Savings Bank* v. *Drake Roofing Co.*, 112 Iowa, 184. But here was an absolute guaranty to a limited amount." If this is authority for the rule that an offer to guaranty future transactions does not require notice of acceptance, if a limit is placed upon the liability to be incurred, this case directly overrules the *German Savings Bank* case, where a like set of facts was involved. But the Court had no thought of overruling that case, as is evidenced not only by the citation just referred to, but also because it quotes from that case with approval. The reference is employed in this way: "It may be said here, as was said by us in *German Savings Bank* v. *Drake Roofing Co., supra:* 'The amount of defendants' (guarantors') liability is fixed by the instrument itself, and the promise is such that notice of advancement made from time to time may well be said to have been waived.'" This quotation lends no support to the proposition that notice of acceptance was not necessary in this case,

because it refers, not to the original notice that the offer was being acted upon, but to the question as to whether subsequent notices must be given as to each advance made. In fact the sentence quoted was used by Mr. Justice Deemer after the holding that "as defendants had no notice or knowledge of its acceptance, it was not binding upon them."

When a note that has been indorsed for accommodation is given to secure a separate obligation, as was true in this case, the position of the indorser may be so like that of a guarantor in some respects that benefits usually recognized in favor of the latter only, well may be extended to him. But notice of acceptance of the undertaking cannot fall within this category because in this respect his position more nearly resembles that of any other accommodation indorser than it does that of a guarantor. More particularly is this true when he himself delivers to the payee the instrument that he has indorsed, as he did in this case, because the mere retention of the negotiable instrument is a warning to him that it is being used for the purpose for which it was delivered. Because of this fact, and the fact that the earlier case relied upon directly holds that notice of acceptance is necessary in a case of guaranty of future transactions, even though there be a limit imposed, we must consider this case as authority for quite a distinct rule, mentioned elsewhere in the opinion, namely that: "We may concede for the purpose of this case that W. E. Mason, by means of this transfer, and to the extent of the amount of this note, became a guarantor for the Mason Hand Lathe Company; but the security thus furnished was the note bearing his indorsement, and imposing on him the liability implied from such indorsement." While it would have been better to have said that his position was in some respects analogous to that of a guarantor rather than to "concede for the purpose of this case" that he was a guarantor, this is a clear statement to the effect that his liability depends not upon guaranty but upon the indorsement of a negotiable instrument.

In *McKee* v. *Needles* (1904), 123 Iowa 195, 98 N. W. 618, the promisor offered to guaranty an existing indebtedness if the promisee, the proprietor of an hotel, would waive his innkeeper's lien as to a certain guest and permit that guest to depart with his baggage. The guarantor was held liable, although no notice of acceptance was given him, for the reason that "notice of acceptance of an absolute guaranty of an existing indebtedness is not necessary" [page 198].

These cases establish two propositions: (1) that no notice of acceptance of a guaranty of an existing indebtedness is required; (2) that notice of acceptance of a guaranty of a prospective obligation is necessary. In addition to this, in spite of some unfortunate language borrowed from the Supreme Court of the United States, the cases square with the sound theory that this notice, where required, is a condition implied in the offer.

RECENT IOWA LEGISLATION

A Bureau of Criminal Investigation

One of the difficulties in the enforcement of the criminal law in Iowa has been the lack of effective machinery for coöperation among the various police departments, sheriffs' offices, and public prosecutors of the State. In the enforcement of the prohibition laws, for instance, cases have come to light where violators of the statutes have been brought to trial and injunctions issued against them, but by moving to another part of the State and making a fresh start in operations, such law-breakers have had the advantage of a clean record and compelled the law enforcing officials to begin proceedings against them anew. One man in Polk County was found, upon investigation, to have four injunctions against him for violation of prohibition statutes. Even more serious has been the lack of a central agency through which information about persons accused of crime could be secured. A prisoner, even when caught squarely in the commission of some serious offense, would urge, in extenuation, that this was his first departure from the path of righteousness, and would thereby, rightly enough, get off with a lighter sentence than a hardened offender would receive. Such an individual might be paroled, and virtually escape all punishment for his crime. While police departments and prosecutors might disbelieve the accused's story, they have not had the facts to refute it. They had no official source of information where a criminal's record could be furnished them, and except in the case of a few of our larger cities, had no scientific method of identification which would put them in touch with clearing houses of information about criminals which exist outside the State. The migratory law breaker, and most professional criminals are birds of passage, has stood a better chance to escape both detection and punishment, because the State had no means of identifying him. Property losses too have been great because there was no system for following up property stolen in one county to its place of sale elsewhere in the State. How great this loss is, and how much of it is preventable, it is impossible to say. That it runs into a great deal of money is common knowledge. One single fact about automobile thefts shows the magnitude of the law enforcement problem here. To one Chicago automobile protection bureau reported car thefts in Fords alone numbered twenty-two hundred in nine months.

It was to meet this situation that the last legislature authorized, in Ch. 186, Acts 39th General Assembly, the establishment of a Bureau of Criminal Investigation. The special peace officers, or "state agents" are the officers of the bureau itself. Section Two of the Act authorizes the Attorney General to provide a system of criminal identification, and contains the further very important provision that "the sheriff of each county and the chief of police of each city and town shall furnish to the department criminal identification records and other information as directed by the attorney general."

Pursuant to this statute, the Bureau was organized in July and has started its work. It is under the general direction of Attorney General Ben J. Gibson. The Chief of the Bureau itself is Mr. Oscar O. Rock of Logan. Mr. Rock has a wide acquaintance in the State; he probably knows personally almost all, if not all, the various peace officers of the State. He has, in addition, had wide experience in the actual field work of law enforcement. The technical expert of the Bureau is Mr. Harry J. Passno of Davenport. Mr. Passno knows photography as a professional; he has been connected with the International Bureau of Identification at Leavenworth, Kansas, and, for several years, has been with the Police Department in Davenport.

The broad purpose of the Bureau of Criminal Investigation, as outlined by Mr. Gibson, is to secure effective coöperation among officials for the enforcing of the criminal law of the State. The work is divided along three lines, for administrative purposes, though it all fits into one general scheme.

The first division is a system of "schools" or informal conferences between officers of the Bureau and local officials in the cities and counties of the State. The purpose of the Bureau is explained, the local officials are informed what help they may receive from the Bureau and what assistance they are required to render it. In addition there is technical instruction, where needed, regarding the identification and statistical work undertaken. Where photographic and finger print records have not previously been kept, officers and departments are instructed about operations and methods in this important phase of the work. Much of this part of the Bureau's activity has already been accomplished.

The second line of work undertaken is the collection of criminal records and statistics, for the identification of law breakers and recovery of stolen property. This is the most interesting part for

the outsider. At Leavenworth, Kansas, the federal Department of Justice maintains a Bureau of Criminal Identification. Here are recorded photographs, finger prints and measurements, of nearly half a million persons who have come into collision with the officers of the law. Penal institutions and the police departments of the larger cities supply this Bureau with records; the Bureau in turn helps the departments in the apprehension and identification of criminals. It is the plan to have the local Bureau become the clearing house for information in this State as this federal Bureau is for the departments which work with it. In addition, by coöperation with the federal Bureau, (and others) the Iowa Bureau can give any sheriff's office or police department in Iowa practically all the information there is concerning the criminal record of any man suspected of law breaking.

Such information is of the utmost value. It gets professional criminals into custody and it saves the public a great deal of money. It is a well known fact among police officers and prosecutors that a person suspected of crime, if really guilty, will more often than not confess when confronted with an accurate identification of himself, his various aliases, and previous jail records. For instance in one county in California, for a given period, seventy-seven persons were arrested charged with felony. Through the State Bureau of Identification, fifty-eight were identified by finger print records. Thus confronted, fifty-three entered pleas of guilty; the others stood trial and were convicted. The Bureau went a long way in paying for itself in the amount saved the State in what a trial for each of these prisoners would have cost.

The Iowa Bureau has started its collection of information concerning persons charged with serious crimes. Local officers are required to send finger print records to the Bureau, and to Leavenworth, as well as to keep such records of their own. Photographs are sent to the Bureau, and Bertillion measurements will be received from such departments as make them.

This information will be received from all over the State, for local officers are required to furnish it. It is then filed according to the most scientific methods. With the finger prints the method is known as the Henry system devised by Sir E. R. Henry of Scotland Yard, and used throughout the world in identification bureaus. By this elaborate system it is easier to identify an individual by his recorded finger prints, than to find a law abiding citizen's name in a telephone directory.

Stolen property records will be kept by local officers and departments and reported to the Bureau. In this way it is hoped to be able to trace property in a way not to be thought of up to this time. Some idea of what we may expect of the Bureau's efforts along this line may be found in the California Bureau's experience. In that State an investment of $35,000 in the Bureau, for 1918-1919, resulted in recovery and restoration to owners of more than $700,000 worth of stolen property, through information furnished by the Bureau. In addition to descriptions of stolen property, local officers will report property recovered, and also give the records of property pawned, whenever ordinances or regulations require such information to be furnished city police departments.

Iowa's Bureau of Criminal Investigation is based largely on that of California where the efforts made in assisting in detection and identification of criminals and recovery of stolen property have been highly successful. Iowa goes beyond the California plan, however, in operating, as part of the Bureau's activities, a secret service department. The work of this branch is divided into four parts; offenses against property; offenses against the person, investigation work, and prohibition law violations together with offenses of minor character. The work in the four departments will be specialized, so that the officer or officers working in each can be experts in their particular lines. These men will work with local officers, where in the judgment of Bureau Officials, their services are needed.

It is too early to tell what success the Bureau will achieve. Its officers have a clear conception of both the objects to be gained and the methods to be followed. The usefulness of their work will depend largely on the intelligent coöperation of local officers in towns, cities and counties in the matter of making reports, and availing themselves of the Bureau as a source of useful information. If all work together, Iowa should be a good place for the professional crook to stay away from. The total cost of the Bureau will not exceed the cost of special agents for last year, for this is the limit of the funds at its disposal.

HERBERT F. GOODRICH

ADMINISTRATIVE PROVISIONS FOR LICENSING OF CHIROPRACTORS, CHIROPODISTS AND OSTEOPATHS

The regulation and control of the practice of gainful occupations or professions, by means of administrative licensing powers, con-

tinues to be extended to new fields. The 1921 legislature extended state control to the licensing of chiropractors[1] and chiropodists[2] and substituted a new act for the previously existing statute as to osteopaths.[3] It is not the purpose of the present note to discuss the social policy embodied in these enactments, but merely to comment on some of the administrative provisions. In each statute a board is created to pass upon applications for licenses. The State Board of Osteopathy[4] and the Board of Chiropractic Examiners[5] are each composed of three persons, members of the respective professions involved, appointed by the Governor; the podiatry (chiropody) examiners are five in number, consisting of two members of the state board of medical examiners, chosen by that board, two licensed podiatrists (how "licensed" podiatrists are to be found in a state which has not previously licensed them, is not explained in the act) also chosen by the state board of medical examiners, and the secretary of the last named board, *ex officio*.[6] The podiatry statute is unique in thus conferring the powers of administration upon a board, a majority of whose members are not necessarily members of the profession regulated.

The public has at times been suspicious that such enactments, adopted ostensibly to protect them, have in reality been passed to further the monopoly of a particular class of persons engaged in the occupation regulated; and the chiropody board is happily free from this criticism. However, as a practical problem of means to an end, it is usually impossible to secure a board with the requisite technical equipment to pass upon the technical fitness of applicants for licenses, without appointing those already members of the profession; and the chiropractor and osteopath statutes simply follow in this respect the statutes creating the state board of medical examiners,[7] the board of law examiners,[8] and the state board of engineering examiners[9].

One of the chief problems of administrative law is to "discriminate between cases where the administration must take the law

[1]Chap. 7.
[2]Chap. 113.
[3]Chap. 77.
[4]Chap. 77, § 6.
[5]Chap. 7, § 3.
[6]Chap. 113, §3.
[7]Compiled Code, § 1313.
[8]*Ibid.* § 7034.
[9]*Ibid.* § 1217.

from the legislature direct and others where owing to the special information at its (the administrative official's) command the legislature must be content to leave it to the administration to work out in detail the principles which alone the former (the legislature) is in a position to prescribe by statute."[10] Judged by this test, the three statutes in question are reasonably satisfactory. The grounds upon which the respective boards are authorized to refuse or revoke a license to practice are set forth in the statutes. If the grounds of revocation are made too narrow, the board will be powerless to deal with new and unforeseen varieties of conduct which impair weighty social interests. With such grounds as soliciting professional patronage by agents,[11] habitual intoxication or use of narcotic drugs,[12] conviction of a felony,[13] continued practice by a person knowingly having an infectious or contagious disease[14] and practicing under a name other than one's own[15] one can have no quarrel on the score of definiteness. These grounds are framed as legal rules which have the sharpness and precision of a criminal statute. On the other hand, "incompetency"[16] and "gross malpractice"[17] are legal *standards* which call for the "common sense of the expert as to uncommon things,"[18] a common sense which "cannot be put in the form of a syllogism,"[19] and yet which gains certainty from the trained instinct and expert intuition of the members of the board,[20] supplemented by judicial decisions which from time to time stake out the limits of the standard. Such grounds as "false and fraudulent representations as to his skill and ability"[21] and "advertising by means of knowingly false or

---

[10]GHOSE, COMPARATIVE ADMINISTRATIVE LAW (1919), p. 588.

[11]Chap. 7, § 9.

[12]Chap. 7, § 9; Chap. 77, § 16 (g); Chap. 113, § 6.

[13]Chap. 77, § 16 (a).

[14]*Ibid.* § 16 (d).

[15]*Ibid.* § 16 (e).

[16]Chap. 7, § 9; Chap. 113, § 6.

[17]Chap. 77, § 16 (c).

[18]Pound, The Administrative Application of Legal Standards, 44 AMERICAN BAR ASS'N REPORTS, p. 445, 463 (1919).

[19]*Ibid.*

[20]*Ibid.*

[21]Chap. 7, § 9.

[22]Chap. 77, § 16 (f).

deceptive statements''[22] really set up standards of dishonesty or moral turpitude, since the element of guilty knowledge is common to both;[23] but the same cannot be said of ''use of untruthful or improbable statements to patients or in advertisements''[24] which would seem to give the board too great latitude in determining what is ''improbable''[25] unless the element of guilty knowledge is read into the statute.[26] The real struggle over statutes of this type has come in reference to such grounds as ''gross unprofessional conduct''[27] ''unprofessional and immoral conduct,''[28] or ''unprofessional or dishonorable conduct,'' the phrase used in statutes of other states. Bearing in mind that ''unprofessional conduct'' in this connection means not merely a breach of some rule of professional ethics[29] but conduct which is actully dishonorable,[30] ''some act or conduct that would, in the common judgment, be deemed 'unprofessional' or 'dishonorable','[31] and that the limits of this standard have already been to a considerable extent staked out by board rulings and judicial decisions,[32] one feels that

[22]See, however, *Green* v. *Blanchard*, 211 S. W. 375 (Ark., 1919) holding that "advertising with a view of deceiving or defrauding the public" was too indefinite to be constitutional. This view, as pointed out by the dissenting opinion, is clearly contrary to the weight of authority.

[23]Chap. 113, § 6.

[24]"Grossly improbable statements" was held too indefinite and hence void in *Hewitt* v. *State Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. (N. S.) 896 (1906). *Cf. Schaezlein* v. *Cabaniss*, 135 Cal. 466, 67 Pac. 755 (1902) holding "to a great extent" too indefinite in a factory act.

[25]Of course, guilty knowledge here, as in cases of judicial justice, could be inferred from circumstantial evidence.

[26]Chap. 7, § 9.

[27]Chap. 113, § 6. It is noteworthy that the osteopathy statute avoids this slippery ground, and that the statute relating to the revocation of physicians' licenses takes great pains to define it in detail. Code 1919, § 1316.

[28]*State* v. *State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238 (1884).

[29]*Ibid.*

[30]*People* v. *McCoy*, 125 Ill. 289, l. c. 295 (1888).

[31]See the last two cases and: *State Board of Health* v. *Roy*, 22 R. I. 538, 48 Atl. 802 (1901) "grossly unprofessional conduct of a character likely to deceive or defraud the public;" *State* v. *Kellogg*, 14 Mont. 426, 36 Pac. 957 (1894) "unprofessional, dishonorable or immoral conduct"; *Simonsen* v. *Swanson*, 177 N. W. 831 (Neb. 1920) "unprofessional or dishonorable conduct"; *Knoop* v. *State Board of Health*, 103 Atl. 904 (R. I., 1918) "gross unprofessional conduct"; *Forman* v. *State Board of Health*,

the delegation of power here is no greater than the situation demands; and the weight of authority is clearly in favor of the constitutionality of this grant of power[33] although there are a few cases holding such phrases too vague to satisfy the requirement of "due process."[34] At all events, the grounds of administrative decision here are much more definite than in the statute providing for the revocation or refusal of an insurance agent's license simply "for good cause"[35] or in the statute authorizing the Secretary of State to refuse a certificate of incorporation "if he is of opinion that they (the articles of incorporation) are . . . against public policy."[36]

The procedural provisions are so diverse, in these three statutes, as to raise the inquiry, why should an osteopath have a different kind of hearing from a chiropractor, or from a homeopath or an allopath, for that matter? Much needless repetition, as well as diversity and confusion, would be avoided if the legislature would draft a single administrative code of procedure for all these boards, and incorporate them under the appropriate headings, by reference. Only thus will administrative procedure ever receive the attention which it deserves.[37] Thus, twenty days' notice with specification of charges is required in two of the statutes,[38] while the podiatrist statute reads simply "after due hearing."[39] It is well settled that both notice and hearing are essential to the validity of proceedings to revoke a physician's license.[40] Again, the chiropractor is "en-

---

157 Ky. 123, 162 S. W. 796 (1914) "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public"; *Richardson* v. *Simpson*, 88 Kan., 684, 129 Pac. 1128 (1913) "any other dishonorable conduct"; *State* v. *Goodier*, 195 Mo. 551, 563, 93 S. W. 928 (1905) "unprofessional or dishonorable conduct"; *People* v. *Apfelbaum*, 251 Ill. 18, 95 N. E. 995 (1911) "unprofessional or dishonorable conduct."

[33] See the cases cited in the last note, of which *State Board* v. *Roy*, *Forman* v. *State Board*, *Richardson* v. *Simpson*, and *People* v. *Apfelbaum* discuss the constitutional questions involved. See also the dissenting opinion in *Green* v. *Blanchard*, 211 S. W. at p. 380 (Ark. 1919).

[34] *Matthews* v. *Murphy*, 23 Ky. L. Rep. 750, 63 S. W. 785 (1901); *Czarra* v. *Board of Medical Supervisors*, 25 App. (D. C.) 443 (1905).

[35] Code 1919, § 5737; *Noble* v. *English*, 183 Iowa 893, 167 N. W. 629 (1918), upholding the constitutionality of this delegation of power.

[36] Code 1919, § 5330; *Lloyd* v. *Ramsay*, 183 N. W. 333. (Iowa 1921).

[37] FREUND, STANDARDS OF AMERICAN LEGISLATION, p. 266.

[38] Chap. 7, § 9; Chap. 77, § 16.

[39] Chap. 113, § 6.

[40] *People* v. *McCoy*, 125 Ill. 289 (1888); 30 CYC. 1557.

titled to be represented by counsel,"[41] a valuable privilege to the individual and a useful aid to the development of a sound technique on the part of the board;[42] yet the other two statutes are silent on this mooted point. Finally, it should be noted that the chiropractor statute alone provides[43] for an appeal to the district court where, as the word "appeal" is commonly construed in such statutes, the whole case will be tried *de novo*.[44] It seems a dubious expedient to impose such work upon a judicial tribunal.[45] In the absence of such a statutory provision, the osteopaths and podiatrists are not entitled to a judicial re-trial on the merits, and the decision of the board, in the absence of fraud, corruption or abuse of discretion, is final.[46] Why should the chiropractor or the allopath[47] have two strings to his bow where the osteopath or the chiropodist has only one?

EDWIN W. PATTERSON

EXECUTOR DE SON TORT ABOLISHED

In the January, 1921, number of this Bulletin was published an article entitled "Executor of His Own Wrong."[1] The scope of the article was briefly indicated by its opening sentences:

"Coming down out of the Year Books and preserved in the decisions of the Supreme Court of Iowa is the now useless doctrine of executor of his own wrong. Not only is it now useless but it is in conflict with the Iowa system of administration of decedent's estates. It could be wiped out of Iowa law not only without loss but with positive gain."

The writer then set forth the history and incidents of this doctrine and showed that the gist of it was that in case any person wrongfully intermeddled with the personal property of a deceased person after the death and before the qualification of an executor or the appointment of an administrator and converted some of the personal assets to his own use or proceeded by usurpation to administer them, instead of confining the remedy to an action brought by the personal representative, subsequently appointed or qualified,

---

[41]Chap. 7, § 9.

[42]Pound. *op. cit.*, p. 464.

[43]Chap. 7, § 9.

[44]*State* v. *District Court*, 19 Mont. 501, 48 Pac. 1104 (1897).

[45]Pemberton, C. J., in the case last cited.

[46]*Traer* v. *State Board of Medical Examiners*, 106 Iowa 559, 76 N. W. 833 (1898); 30 CYC. 1557.

[47]Code 1919, § 1318.

[1]D. O. McGovney, 6 Iowa Law Bulletin 65.

this anomalous doctrine permitted a creditor of the deceased to sue the wrong-doer and recover on his claim to the extent of the assets that had come into the hands of the intermeddler. The possibility that a sharp creditor might, by use of this alternative to filing his claim in the usual manner, gain a preference, and the impropriety of allowing anyone but an executor or administrator to recover compensation from an intermeddler, so that the amount recovered would come into the estate and be available for all creditors equally, were pointed out.

It was also shown that while the doctrine seemed to be forgotten in practice, the decisions of our court recognized its continued existence, in spite of a provision brought into the Code in 1851, which the writer thought would have abolished it if the code provision had been properly construed. To cut off any recurrence of the objectionable doctrine the article suggested that 1897 Code Sec. 3407 be repealed and as a substitute the following enacted:—

"The doctrine of executor of his own wrong is abolished and one who wrongfully intermeddles with the personal property of a deceased person may be sued only by the personal representative of the deceased and such action shall be governed by the ordinary principles of liability for wrong doing."

The 39th General Assembly accomplished this result by the insertion of the single word "only" in 1897 Code Sec. 3407 (C. C. Sec. 7938), making it read thus:—

"Any person who, without being regularly appointed as executor or administrator, intermeddles with the property of a deceased person, is responsible *only* to the regular executor or administrator, when appointed, for the value of all property taken or received by him, and for all damage caused by his acts to the estate of the deceased."

It would have been better had the word "personal" been inserted before the word "property" in the third line. In view of the history of this code article, however, and in view of the fact that the doctrine of executor of his own wrong never applied to intermeddling with realty[2] it will be readily judicially assumed that the amended article was not intended to vest in the personal representatives actions for wrongs done to realty nor to divest heirs and devisees of their rights in that respect.

D. O. McGovney

[2]6 Iowa Law Bulletin at page 67.

Chattel Loans

Social workers have for several years been interested in the problem of the so-called "Loan Shark." By the term "Loan Shark" is meant the person or corporation which makes a practice of loaning a small amount of money to persons in destitute circumstances and the common practice has been to demand what would be, if all the charges were taken into account, a very high rate of interest. These loans are generally secured either by furniture or an assignment of wages. Several extensive investigations have been made in different cities and the evils of this unregulated business are generally recognized.

The Iowa Legislature in 1915 passed a law limiting the amount of interest which could legally be charged either directly or indirectly to 2% a month but the law also allowed in addition a reasonable charge for the investigation and inspection of the security, and for drawing up the papers, not exceeding one dollar, and for recording the same. The cost of inspection and investigation was not to exceed 10% of the amount loaned when the loan is under $50.00 and in no case could the charge be over $5.00.

The Thirty-Ninth General Assembly (Ch. 35) passed a much more comprehensive act which if enforced should greatly improve conditions as they have existed in some of the larger cities of the State.

Section One of the act requires every person or corporation engaged in the business of making loans of money, credit, goods, or things in action in the amount of $300.00 or less to secure a license from the Superintendent of Banking of the State. The license fee is $100.00 a year. The law also requires that a bond of $1,000.00 be filed by the person or corporation doing this line of business and that the license shall be kept conspicuously posted in the place of business of the licensee. The law allows a charge of 3½ per cent per month, if a greater charge is made the lender cannot collect principal, interest or additional charges.

The one great difficulty that investigators have always encountered in connection with the so-called "Loan Shark" has been that his business was carried on in secret. The advertisements always promised perfect secrecy. "No one will ever know of the loan, not even your wife or your employer" was a very common expression used. The Iowa law very wisely requires that the books shall, at all times, be open to the proper official and that no assignment

of future wages or mortgage on furniture made by a married man will be binding unless signed by his wife. The law also requires that the lender cannot collect, through assignment of wages, a greater amount to apply on the loan than 10% of the wages of the borrower at any one time when wages are paid. Any charge in addition to the 3½ per centum per month is prohibited except in cases where a lawful fee is paid to a public officer for filing or recording any instrument to secure the loan.

The provisions of this act shall not apply to any existing private bank or bankers doing a general banking business or to any person, copartnership, or corporation doing business under the law of this state, or of the United States relative to banks, trust companies, building and loan associations, or licensed pawn brokers, nor to any domestic corporation entitled to the benefits of Chapter 151, Acts of the Thirty-Eighth General Assembly, relative to loans and loan corporations.

C. W. WASSAM

COLLEGE OF COMMERCE
STATE UNIVERSITY OF IOWA

VITAL STATISTICS

Inasmuch as the real wealth of a country lies in its people rather than in its material resources, the accurate facts concerning its vital capital are of first importance. Such data are necessary for various legal and governmental purposes as well as for historical, economic, and social study of human life and well-being. To the sanitarian they are an accurate index of the physical health of the people and the hygienic conditions under which they live. To the health officer they are indispensable first data. In any public health movement the prompt and accurate registration of vital facts, especially those of morbidity, is as indispensable as is a fire alarm system to the efficient functioning of the city fire department.

The desirability of an accurate system of vital bookkeeping is perhaps nowhere questioned. It is now everywhere recognized as an essential governmental function. But the systematic and accurate collection and the permanent recording of vital facts nowhere covers any long period of time. The longest unbroken series of vital statistics, that of Sweden, covers a period of little more than a century and a half. At the present time, however, the vital statistics of the leading European countries are upon an accurate and comprehensive basis.

The United States has not kept pace with the other civilized countries in this respect. Owing to our distributive form of government, the duty falls upon the separate States and they have not been equally ready to see the need or assume the burden. Consequently there is no nation-wide system of registration, the record of births and deaths is incomplete and inaccurate, and the collected data are often not comparable. At the present time, approximately forty per cent of the population live in regions outside of registration areas. Even the records collected vary greatly in different sections of the country; in some of the northern and eastern States they now extend over several decades and are coming to be fairly accurate; in most of the Southern States the records are entirely absent or so defective as to be practically worthless; in some of the central and western States registration is absent or incomplete. The very best of the American registration statistics are admittedly inferior to those of most European countries.

Without going into the historic development of vital statistics in Iowa, it may be noted that legislative provision for birth and death registration has existed for more than a decade. The law of 1913 was incomplete and the provisions for the most part not well thought out. With an appropriation of only two thousand dollars a year to guarantee its operation, not much could reasonably be anticipated and not much was accomplished. The birth registration, for example, was nothing more than an annual census, the provision being that births were to be reported by the assessor at the time of assessment and transmitted by him to the State Board of Health at the close of the calendar year. The first provision for an actual birth registration, as distinct from a census, was made by the Thirty-Seventh General Assembly.[1] This act of 1917 made it obligatory on physicians, midwives, or other attending person, to report births to the Clerk of the District Court within ten days. This court official was required to transmit a monthly report to the State Registrar. The 1917 provision for birth registration was the chief advance made since the enactment of the law of 1913.

It is thus seen that the vital statistics of Iowa have not been entirely lacking as has been the case in many of the States. But they have been inadequate and defective, somewhat lacking in uniformity, with a faulty method of collection, while an adequate provision for their proper systematization, preservation, and publication has been lacking.

[1]Laws, 37th Gen. Assembly, Ch. 326, Sec. 5.

But whatever the defects of the earlier legislation, they have been, at least in large part, remedied by the comprehensive vital statistics act of 1921.[2] This act, designed to provide for the immediate and accurate registration of births and deaths by means of birth and death certificates and burial and removal permits, centralizes the system and provides the necessary funds and legal machinery for thorough organization and efficient operation.

The act provides for a state registrar of vital statistics responsible for the thorough and uniform enforcement of the law and specifically empowered to recommend additional legislation that may from time to time be necessary. Responsibility is definitely placed. The State is to be districted into definite areas of workable size; each city, incorporated town, and township is to be constituted a primary registration district. Each primary district is to have a local registrar of vital statistics who, in turn, shall appoint a deputy and such assistant registrars as may be necessary. These local registrars and deputies are placed under the supervision and control of the state registrar and are immediately responsible to him. He is given the power to remove any local registrar or deputy for negligence or inefficiency or failure to make prompt and complete returns as required. There is thus provision, under penalty, for the collection and report of vital facts by properly appointed local registrars. Provision is made for the establishment of a bureau of vital statistics at the state capitol, and for vaults and filing cases for the safe and permanent preservation of records. The state registrar is responsible for the systematic arrangement and permanent preservation of the certificates and is required to maintain a comprehensive and continuous card index of all births and deaths registered.

Death certificates are to be of the standard United States form as approved by the Bureau of the Census. In filling in these certificates the physician is required to state the cause of the death, giving both the primary and the contributing cause, if any, and the duration of each. Indefinite terms, indicating symptoms or conditions caused by the disease, will not be held sufficient for issuance of a burial or removal permit. The provision in regard to this seems sufficiently detailed and explicit to prevent the practice, common in some places, of reporting only symptoms or contributing causes and thus concealing the existence of local epidemics.

The act very properly places the responsibility for reporting

[2]Laws, 39th Gen. Assembly, Chaps. 222, 229.

births upon the attending physician, midwife, or person acting in the capacity of midwife. If neither physician nor midwife be in attendance, the responsibility falls upon the father or mother, the householder or owner of the premises, and the manager or superintendent of the institution where the birth occurs. In any case there is a definite placing of responsibility and, in view of the penalty prescribed and the fact that the act elsewhere provides for a state-wide registration of physicians, midwives, undertakers, and casket makers, there is reason to anticipate a fairly full and accurate birth registration.

A particularly admirable provision is that in regard to stillbirths. The act provides that each stillbirth shall be registered as a birth and also as a death, and that both the birth and the death certificate be filed with the local registrar in the usual form and manner. The medical certificate must show the cause of the stillbirth if known. Midwives are forbidden to sign the certificates for stillborn children. These provisions if properly enforced should presently yield a most valuable body of much needed information and possibly also exercise some repressive influence on the lucrative practice of inducing abortion.

A curious provision of the law, perhaps more interesting in its reflection of popular attitude than in its social or legal significance, is that in regard to the father of an illegitimate child. After reciting that in recording a birth the full name of the father shall be given, the reservation is made that in the case of an illegitimate child the name of the putative father shall not be entered without his consent, though other particulars relating to him—residence, color or race, age, birth-place, and occupation—may be entered if known.

A weakness in the present law would seem to lie in its somewhat inadequate provision for publication. To be of the greatest scientific as well as the greatest social value there should be adequate provision for making public the registration findings. This phase of the situation seems not to be adequately stressed.

The law in most of its provisions is admirable. In the mass of progressive social legislation passed by the legislature at this session this is one of the outstanding laws. Its enactment makes it possible to develop in the State a body of accurate and valuable vital statistics.

DEPT. OF SOCIOLOGY
STATE UNIVERSITY OF IOWA
E. B. REUTER

Iowa Law Bulletin

Published four times a year by the faculty and students of the College of Law of the State University of Iowa. Issued January, March, May and November.

THE COLLEGE OF LAW. Attendance at the law school continues to grow larger. The increase this year is 26%, on a basis of comparison with the registration at the corresponding date last year. It is interesting to compare this enrollment with that for 1916-1917, the last normal year before the war. The figures are as follows:

	First Year	Second Year	Third Year	Total
1916-1917	50	37	48	138
1920-1921	88	51	24	163
1921-1922	95	63	50	208

This year's record brings the attendance back to the place it was before the requirements for preliminary college work for admission to the law school became effective in 1914. It marks the acceptance, seemingly, on the part of law students, of the requirement for longer and broader preliminary education as a foundation for the technical study of law.

The tendency has been, very distinctly from a period at least as far back as the establishment of the college work requirement, for students to exceed the minimum demands in the way of college preparation. Fourteen of the men entering this year have college degrees. Forty-seven have had three or more years of college work. Many of these students are eligible for an arts degree upon the completion of their first year's work in law, on the Combined Course arrangement, whereby one year's work in law may count toward both degrees. This arrangement not only holds good with the

Liberal Arts college at the University, but with most of the colleges of the State as well.

The College of Law is, almost entirely, an Iowa school. Of the entire student body of two hundred and eight, only eight are registered from outside the State. The list of schools where liberal arts work was done, is however, very cosmopolitan. Thirty-five colleges are represented in the entering class alone, ranging geographically from West Point to Stanford. A majority of the students have done all or part of their college work on this campus. The list of other schools represented is worth setting out. They are: Notre Dame, Stanford, Michigan, Nebraska, U. S. Naval Academy, Hamline, Creighton, Virginia, Wisconsin, Northwestern, Chicago, West Point, Minnesota, Carleton, Vermont, Illinois, Pennsylvania, Western Normal. Within the State, are students from Coe, Grinnell, Ames, Cornell, Drake, Morningside, Parsons, Iowa Wesleyan, Buena Vista, Trinity, Upper Iowa, Highland Park, Columbia, Des Moines, Dubuque, and State Teachers College.

The Dillon first and second year prizes of $50.00 each, awarded to students who, in the first and second year classes, attain the highest rank upon the average examination grades in their respective courses, have been awarded to Frederic M. Miller of Des Moines (second year prize) and William K. Carr, of Lamonte, Mo., and Clyde B. Charlton of Rolfe. The two men last named tied for first honors in the first year class last year and the prize was divided between them. Mr. Miller repeats a past performance, having tied for first place and received half the prize in his first year in the law school.

Better Criminal Justice. On another page of this number of the Bulletin is discussed the new Bureau which is to aid in apprehending and identifying criminals. With this it is interesting to note the efforts made along lines where the problem is perhaps more difficult and where signs of encouragement are few, that is, in the actual administration of the criminal law itself.

It seems generally to be admitted that there is something wrong in our law enforcement, especially in our cities. In Cleveland, Ohio, a number of good citizens were stirred to action by a scandal in their local Municipal Court and the ever mounting crime records. They decided to go to the bottom of things in finding out what was the matter, and to employ competent investigators for that purpose. The Cleveland Foundation was formed to handle the investigation. Dean Roscoe Pound and Professor Felix Frankfurter of the Harvard Law School were secured to have general charge of the work. The undertaking itself was divided into several departments such as the Criminal Courts, Police, Treatment of the Convicted, and so on. Reports of the work will soon be available. A summary of the investigation of the Criminal Law Courts appears in the current number of the Journal of the American Judicature Society, published at 31 W. Lake St., Chicago. The work was done

by Reginald H. Smith and Herbert B. Ehrmann of the Boston Bar. Mr. Smith will be remembered as the author of the widely read "Justice and the Poor."

The investigators found in Cleveland an ample body of reasonably satisfactory law defining criminal conduct and its punishment. There was no tendency to depart from the time evolved method of administration of law through trained judges. They did find, however, what has excited concern of thinking men there and elsewhere, a lack of underlying sense of respect for the law. As objective manifestations of such a condition are shown the miserable surroundings in which the courts are forced to work; the ease of purchasing immunity from jury service by membership in a military organization, the public toleration of perjury.

In the handling of criminal matters many evils are found. Cases are badly handled. The cumulative effect of delays is to make the cases so stale that no one wants to prosecute them, and there are no witnesses left with which to prosecute them. The power to grant new trials "has been prostituted apparently for the purpose of allowing individual judges to work out their individual ideas as to the proper disposition of a case." The parole system is inadequate. Men needed as witness whose only fault is poverty are put in jail and kept there for months. The personnel of the judiciary is not high enough, and this naturally shows its effects throughout the whole system. Part of this, it is said, is caused by the necessity on the part of the judges to be constantly in politics in order to hold their jobs.

Several recommendations are made, which will not be set out here in detail. The first, and the one on which the most emphasis is placed, is the necessity of securing good judges. If it is impossible to do away with the elective system, it is recommended that judges be elected in the first instance for a short term, four or six years. At the end of the term, re-election should be for a longer term, and the judge should run, not against another candidate, but upon his own record. The plain issue would be—shall the judge be retired or returned? The third term should be for life or until retirement. It is pointed out that in the selection of judges an intelligent and well organized bar is desirable and necessary.

Division of criminal business between courts should be abolished, in the opinion of the investigators. A unified court handling all criminal business and organized to handle its own administrative affairs, can, in the hands of able judges, do wonders. In the same number of the Journal (above referred to) in which the summary of the Cleveland report appears is a report on the first year's operation of the Detroit Unified Criminal Court, prepared by the Detroit Bureau of Governmental Research. A combination of able men on the bench and reorganized judicial machinery has made a record best shown in the following table of crimes reported to the police department.

January 1st to July 31st

Crime	1916	1917	1918	1919	1920	1921
1. Break and entering tering business places	620	845	605	615	776	252
2. Breaking and entering dwellings.	913	824	686	852	755	260
3. Larceny from person	632	548	372	450	364	245
4. Robbery	226	465	276	358	621	225

Conditions of Cleveland and Detroit are not those of Emmetsburg, Ottumwa or Des Moines. Yet the fundamental requirements of a public respect for law and able men to administer it are the same everywhere. The difference is only in the machinery required. It is certainly to be hoped that the Cleveland report will receive the attention of every thoughtful lawyer.

NOTES

FORBIDDING INSTRUCTION IN FOREIGN LANGUAGE AS AN INTERFERENCE WITH RELIGIOUS LIBERTY.—Before considering what constitutes interference with religious freedom it is necessary to see what constitutional provisions have been made to assure the right to worship as religious convictions dictate. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." From the very wording of this provision it is clear that while a limitation is placed upon the power of congress in this respect, the States themselves are not included in its prohibition, and it has been so held.[1] Might is not be argued then that religious liberty is part of the liberty protected against the power of the States by the due process clause of the 14th Amendment? Such an argument does not seen tenable.[2] In the first place there is a due process clause as to the federal government in the 5th Amendment, United States Constitution. If religious freedom is included under that clause then Amendment I above referred to would be unnecessary surplusage.[3] Clearly Magna

[1] *Permoli* v. *City of New Orleans*, 3 How. 589; *Brunswick, Balke, Callendar Co.* v. *Evans*, 288 Fed 991. In the former case it is said, "The constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws".

[2] The quotation above does not apply as the case was decided before the 14th Amendment. No decision found in point.

[3] *Twining* v. *New Jersey*, 211 U. S. 78, where by similar reasoning it was held that the due process clause did not apply to freedom from giving self-incriminatory testimony.

Charta's[4] protection of liberty, always judicially referred to as the equivalent of our due process of law clauses, was not construed in England as embracing freedom of religious worship; for centuries afterward an established church was not regarded as inconsistent with it. It is also true that Iowa by treating personal rights and religious liberty in separate sections of the State constitution has indicated that the two rights are separate and distinct.[5] However shocking it may seem to a people so much imbued with the principle of religious freedom as are Americans of today, so far as the federal constitution is concerned there seems no logical reasoning upon which a court could hold that a State would be overstepping its bounds in establishing a state religion. Of course the idea of a State really doing such a thing is absurd. A strong public sentiment, while it lasts, is a surer safeguard of liberty than is a constitutional restriction.

Constitutional limitations against restraint of religious liberty by State legislatures are then to be sought for in State constitutions. The constitution of the State of Iowa provides,[6] "The General Assembly shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes or other rates for building or repairing places of worship or the maintenance of any minister or ministry." It is further provided,[7] "No religious test shall be required as a qualification of any office of public trust, and no person shall be deprived of any of his rights, privileges or capacities or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity in consequence of his opinions on the subject of religion, . . ." These provisions show how necessary the safe-guarding of religious liberty has been considered to be and it is remarkable how careful the legislatures have been and how few cases have arisen on this particular phase of constitutional law in this land and in other States with like provisions.

It is interesting to notice the Iowa cases on the general subject of religious liberty. It has been held that a statute exempting non-income-producing church property from taxation was valid.[8] This view though generally sustained has been seriously criticized.[8a] It has also been held that the electors of a district township may constitutionally authorize the use of a school house for religious wor-

[4]See BOUVIER'S LAW DICTIONARY, Vol. 2, p. 2061.

[5]Iowa Const., Art. 1, Secs. 1, 3, and 4.

[6]Iowa Const., Art. 1, Sec. 3.

[7]Iowa Const., Art. 1, Sec. 4.

[8]*Trustees of Griswold College* v. *State*, 46 Iowa 275.

[8a]Carl Zollman, "Religious Liberty in the Law," 17 Mich. L. Rev., at p. 474.

ship and for such moral and scientific lectures as do not interfere with school purposes.[9] *Moore* v. *Monroe*[10] brought up the much argued question of the constitutionality of a statute permitting the reading of the Bible and singing of religious songs in public schools and the statute was held valid. The trend of recent decisions elsewhere is to the contrary.[10a] In the more recent case of *Knowlton* v. *Baumhover*,[11] in holding that public funds could not be used in conducting a sectarian school in connection with a public school, the Court pursued a line of reasoning which it admitted was inconsistent with the opinion in *Moore* v. *Monroe* but expressly stated that it did not overrule that case. The Court said in *Moore* v. *Monroe* that pupils whose parents objected did not have to take part in or be present at the Bible reading so that that case, like *Knowlton* v. *Baumhover*, raises a question of the establishment of religion in the sense of State support or countenance, rather than a question of interference.

The late Iowa case of *State* v. *Bartel*[12] raises squarely the point of interference with religious worship. The defendant in this case was convicted of violating the anti-foreign language statute of the 38th G. A., which is set out in the foot-note.[13] The defense offered was that the defendant taught the German language to the children in addition to the customary subjects taught in English in order that the children could be given religious instruction in the home and could worship in the church, it being admitted that religious services were given in the German language and that some of the parents knew no other. The Supreme Court of Iowa held that the statute covered this case and that it was constitutional. The Court was divided four to three, the minority contending that the statute did not apply to these facts and that if it did it was unconstitutional as interfering with religious worship.

To get at the principles underlying this question let us consider what relation the use of a particular language has to religious worship. Where the language is itself an essential element of a particular sacrament or religious exercise certainly a prohibition of its

---

[9] *Davies* v. *Boget*, 50 Iowa 11.

[10] 64 Iowa 367.

[10a] See 12 C. J. 943; 14 L. R. A. 418; 29 L. R. A. (N. S.) 442.

[11] 182 Iowa 691. See *Lee* v. *Hoffman*, 182 Iowa 1216, for dicta in a case involving high-school fraternity legislation.

[12] 181 N. W. 504.

[13] Sec. 1, c. 198, 38th G. A. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.

use would be an interference with the liberty of religious worship. It is only necessary to consider a few classes of cases however to see that not all practices based on religious belief are protected.[14] For instance a federal statute making bigamy a crime in any place where the United States has exclusive jurisdiction is valid though construed to prevent polygamy among members of a religious sect whose religious faith approved it as a religious duty.[15] So too it has been held that a statute requiring parents to summon proper medical attention for their children was constitutional and that a defendant's failure to do so was not excused by the fact that he belonged to a religious sect which believed prayer for Divine aid was the only proper remedy.[16] Most statutes prohibit the sale of liquor as a beverage and not its use in religious sacrament. In attacking a Texas local option law it was urged that while the statute did make an exception in case of sacraments that intoxicating liquors where used by the Jews for religious exercises other than sacraments and as it interfered with this the statute was unconstitutional. The Court held the statute good.[17] Now the use of a foreign language is not so shocking to our moral senses as bigamy and the like, and while, as in the case of intoxicating liquor, there may some time be a change in public opinion, yet until that time comes there seems no reason why the use of foreign languages in the sacraments should not be protected.

While on theory our government has been said to recognize no particular religion, Christian or pagan,[18] it will be seen in looking at the cases that the fact that this is a country founded and inhabited for the most part by people of the Christian religion has had its effect. Our Sunday "Blue Laws" have been upheld on the ground that Sunday is a civil and political institution aiding the public health,[19] and the laws against blasphemy are justified as tending to prevent breaches of the peace.[20] Many other illustrations could be given but this is enough to show what is after all but a natural result.

---

[14]For an extended article covering this subject very thoroughly see 17 Mich. L. Rev. 355, 456, "Religious Liberty in the Law," by Carl Zollman.

[15]*Reynolds* v. *United States*, 98 U. S. 145. See *United States* v. *Snow* (Utah), 9 Pac. 697; *Davies* v. *Beeson*, 133 U. S. 333; *Late Incorp.* v. *U. S.*, 136 U. S. 1.

[16]*People* v. *Pierson*, 176 N. Y. 201.

[17]*Sweeny* v. *Webb*, 97 Texas 250. The case does not give much of a discussion.

[18]*Rogers* v. *Brown*, 20 N. J. L. 119; *Watson* v. *Jones*, 80 U. S. 679, 728. See however 17 Mich. L. Rev. 355, 456; 15 Col. L. Rev. 704. As to freedom of speech in war time, see 32 Harv. L. Rev. 932.

[19]*Herrington* v. *Georgia*, 163 U. S. 299. See 15 Col. L. Rev. 619.

[20]*Commonwealth* v. *Kneeland*, 37 Mass. 206.

What of the police power under which such legislation as that given above is said to be supported? This so-called police power seems to be simply a rule of construction whereby a reasonable interpretation is given to the various constitutional provisions and they are construed as not preventing the passing of laws in the interest of public health, safety, and morals.[21] It is not disputed that if a statute does violate a constitutional provision nothing can save it or make it valid. Certainly however there was no intention to grant religious liberty such scope as to prevent the safe-guarding of other important social interests such as life, health, or morals.

Having considered the use of a foreign language as part of a sacrament, what of the use of a foreign language in giving religious instruction? The Supreme Court of Nebraska[22] in construing a statute similar to the Iowa statute in question, while holding that the statute did not apply to religious instruction, seemed to infer that if it did it would be unconstitutional. This seems sound. If you forbid religious instruction and worship in a foreign language you deprive foreigners not understanding the English language, and in many cases too old to learn English easily, of the benefits of religious instruction and worship, at least for some time. It seems therefore that the use of a foreign language may be essential to effective religious instruction and worship. As said in regard to the use of a foreign language in a sacrament there seems to be no sufficient justification for such interference. The majority of the Court construed the statute as prohibiting the teaching or study, in private as well as public schools, of any foreign language, through the medium of secular literature in such languages, except in courses above the eighth grade. The defendant claimed that this cut off effective teaching of any foreign language and thus interfered with the equipping of some pupils with the medium in which alone their parents were able to give them religious instruction, and in which the religious worship of their parents was conducted. Religious instruction by means of a foreign language is not prohibited; even the acquisition of the foreign medium of instruction is not prohibited; it is regulated. The majority concedes that a foreign language may be taught in private schools by the use of religious literature. The regulation therefore is not drastic.

Is the act of teaching a foreign language by use of secular literature so closely connected with religious worship by reason of its purpose, (to equip the pupil with a medium through which outside the school he receives religious instruction) as to bring it within

---

[21] *Tancray* v. *Budge*, 14 Ida. 621; *Eubank* v. *Richmond*, 226 U. S. 137.

[22] *Nebraska Dist. Evangelical Synod* v. *McKelvie*, 175 N. W. 531; 7 A. L. R. 1688. The case does not cite constitutional restriction as to religious liberty which is similar to that of Iowa and found in Neb. Const., Art. 1, Sec. 16.

the protection? Is such act apparently secular in itself made religious by its purpose? Certainly this thought has a valid field of operation. The dissent cite *State* v. *Amana Society*[23] as authority for the proposition that intent must be considered in determining whether an act is religious or secular. Certainly the Court did there so hold. A statute prohibiting manufacture of wine for sacramental purposes is equivalent to prohibiting its use for such a purpose. So a statute absolutely prohibiting any instruction of children in a foreign language would prevent their religious instructors from giving them religious instruction in that language. But the statute here falls far short of that. It applies only to schools; it applies only, as construed, to the use of secular literature as the medium of instruction.

The regulation seems light in degree, in proportion to the public interest which the legislature sought to protect. All interests tend to claim paramount importance and absolute protection. Here the social interest in freedom of worship is competing with the social interest in a homogeneous, harmonious, and loyal citizenship. The legislature should be conceded a reasonable range of discretion in harmonizing such conflicts. To hold that a regulation which so slightly and indirectly affects religious worship is a prohibited interference would seem to be giving too broad a range even to so sacred a principle as that of freedom of religious worship.

INSTRUCTION TO THE JURY WHERE HANDWRITING IS IDENTIFIED BY EXPERT TESTIMONY.—The development of modern expert testimony on handwriting and comparatively recent cases[1] emphasizing the difference between such testimony accompanied by cogent reasons for the opinion and the kind of testimony formerly available on this subject, suggest the question whether or not in Iowa it would not be error, in a case where the modern idea has been fully and carefully developed in the testimony, for the trial court to give without substantial modification the instruction often approved by the Supreme Court to the effect that expert testimony on handwriting is of the lowest order of evidence and of the most unsatisfactory character.

The more advanced handwriting experts now seek to place the facts before the jury in such a manner that their testimony amounts practically to a demonstration. In this way the jury sees what the expert has seen by his comparison, and is led to arrive at the same conclusion, so that the expert's opinion is really of secondary im-

[23]132 Iowa 304. An action against religious corporation alleged abuse of corporate charter in conducting certain farms, factories, and mills, etc. Held, as common property was not operated for profit but simply to support the members of the society as their religious faith directed the corporation was acting within its power.

portance. The evidential facts are placed before the jury in the form of enlarged photographic reproductions, on scaled lines, of the disputed writing and of writings of the same person admitted or proved to be genuine, thus placing emphasis on the similarities or the lack thereof in such writings, and permitting of accurate and minute measurements of the various strokes and loops in, and the spaces between, letters.

Formerly the best testimony that could be secured on this subject was that of men accustomed to handling checks and other instruments with signatures attached, who, without careful examination and comparison, gave opinions based largely on the general appearance of the writings offered in evidence. A very early Iowa case[2] gave abundant latitude for any man of ordinary business experience to qualify as an expert for the purpose of giving testimony on this subject; hence, having thus opened wide the door, it is easy to see why the courts soon recognized that it was necessary to instruct as to the weight of so-called expert testimony which had been made admissible by the showing of very slight qualifications. One case[3] approving the instruction under discussion clearly indicates that the character of the testimony offered was not such as is now generally understood to be embraced in modern expert testimony on handwriting, for the instruction points out that the testimony before the jury is "the result of comparison of the signature in question with the genuine signature of the defendant, as the same is remembered and impressed upon the mind of the witness whose opinion is so given."

Can it not more properly be said that such testimony may range from the very lowest order of evidence—an expression frequently approved by our Supreme Court—to "evidence of the highest rank," as was said in the Florida case cited above, depending on the character of the evidence offered in any particular case?

The first intimation of a possible distinction by our court in such regard is found in *Murphy* v. *Murphy, infra.* The first reference in the Iowa reports to photographic enlargements of standard and disputed writings offered in evidence occurs in *Blakesburg Savings Bank* v. *Burton,* 156 Iowa 671, but as this case was tried in equity the question of an instruction on the subject did not arise. *Johnston* v. *Linder, infra,* evidently deals with what is understood to be modern expert testimony on this subject, but this case was also tried to the court.

Where expert opinion testimony accompanied by cogent reasons therefor has been placed before the jury, would not the lawyer

---

[1]*Baird* v. *Shaffer,* (1917) 168 Pac. 836 (Kan.); *Boyd* v. *Gosser,* (1919) 82 So. 758 (Fla.); *In re O'Connor's Estate,* (1920), 179 N. W. 401 (Neb.).

[2]*Hyde* v. *Woolfolk* (1855), 1 Iowa 159.

[3]*Bruner* v. *Wade* (1892), 84 Iowa 698.

tendering such evidence, besides dwelling somewhat in his argument to the jury on the meaning of the terms used in the ordinary instruction on the subject in this jurisdiction, in view of the Iowa cases approving such instruction given under another state of facts, do well to request the following or a somewhat similar instruction, and ought not the trial court to grant such request or give an instruction in his own language containing the ideas embodied in the request?

The portions shown in italics have not been approved by the Iowa Supreme Court in instructions, but authority therefor is shown in the cases cited.

"Our statute provides that evidence respecting handwriting may be given by experts, by comparison, with writings of the same person which are proved to be genuine.[4]

"Evidence of this character has been introduced upon this trial, and it is for you to say how much weight shall be given to such testimony, taking into consideration the amount of skill and experience possessed by the witnesses,[5] *and the quality or character of the testimony given by them.*

"But while it is proper to consider such evidence and to give it such weight as you may think it justly entitled to, yet it is proper to remark that it is of the lowest order of evidence,[6] or evidence of the most unsatisfactory character,[7] *when unsupported by convincing reasons for the opinions expressed by such witnesses.* It ought not to overthrow positive and direct evidence of credible witnesses who testify from personal knowledge, but is most useful in cases of conflict between witnesses as corroborating testimony[8] *in determining what witnesses are worthy of belief.*

"The theory on which expert witnesses are permitted to testify is that the handwriting is always in some degree the reflex of the nervous organization of the writer, which, independently of the will and unconsciously, causes him to stamp his individuality in his writing. The value of such evidence depends largely on the identification and number of similar characteristics or lack thereof between the disputed writing

---

[4]Code, § 4620.

[5]*Whitaker* v. *Parker* (1876), 42 Iowa 585; *Bruner* v. *Wade* (1892), 84 Iowa, 698; *Patton* v. *Lund* (1901), 114 Iowa 201.

[6]*Borland* v. *Walrath* (1871), 33 Iowa 130; *Whitaker* v. *Parker*, *supra*; *Jackson* v. *Adams* (1896), 100 Iowa 167; *Patton* v. *Lund*, *supra*; *Ayrhart* v. *Wilhelmy* (1907), 135 Iowa 290.

[7]*Whitaker* v. *Parker*, *supra*; *Hammond* v. *Wolf* (1889), 78 Iowa 277; *Browing* v. *Gosnell* (1894), 91 Iowa 448; *Patton* v. *Lund*, *supra*.

[8]*Whitaker* v. *Parker*, *supra*; *Bruner* v. *Wade*, *supra*; *Patton* v. *Lund*, *supra*; *Ayrhart* v. *Wilhelmy*, *supra*.

and the standards. The appearance or lack of one characteristic may be counted as a coincidence or accident, but, as the number increases, the probability of being a mere coincidence or accident disappears, and conviction may become irresistible.[9] *If supported by sufficiently cogent or convincing reasons, the testimony of such expert witnesses may amount almost to a demonstration.*[10]

"The statute further provides that the jury may also compare the signature in dispute with the writings of the defendant proved to be genuine.[11] It is therefore your duty and privilege to make such comparison, and in determining whether or not the defendant actually signed the note sued on, you will give to your own comparison and the knowledge gained therefrom, as well as to the testimony of the expert witnesses and any other witnesses on the subject, such weight, and such only, as you believe it fairly and justly entitled to in view of all the facts and circumstances disclosed in evidence in this case."[12]

GORDON L. ELLIOTT

DES MOINES, IOWA

RECENT CASES

ADMINISTRATIVE LAW—FILING ARTICLES OF INCORPORATION—DISCRETION OF SECRETARY OF STATE.—Plaintiff submitted articles of incorporation to the Secretary of State, which were rejected because they provided for $5,000 of common stock and $195,000 of preferred stock, which the Secretary held was contrary to "public policy and good business practice." This decision was approved by the Executive Council on appeal. The plaintiff brings *certiorari* and asks an order compelling the Secretary to file the said articles. Held, that the Secretary of State and the Executive Council have discretion in this regard and that no error appears on the record. *Lloyd* v. *Ramsay*, 183 N. W. 333 (Iowa Sup. Ct.).

The statute (Code Supplement 1913, § 1610) provides that if the Secretary of State "is satisfied that they (the articles of incorporation) are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan of doing business, if any be provided for, is honest and lawful, he shall file them;" otherwise he "shall not file them." It is further provided that in some cases there may be an appeal to the Executive Council.

---

[9] *Murphy* v. *Murphy* (1910), 146 Iowa 255; *Johnston* v. *Linder* (1913), 168 Iowa 456. And see cases from other jurisdictions cited in footnote to first paragraph of this article.

[10] *Venuto* v. *Lizzo* (1911), 132 N. Y. Supp. 1066.

[11] Code, § 4620.

[12] *Patton* v. *Land*, *supra*.

No express provision is made for a hearing of the applicant either before the Secretary of State or the Executive Council. In some classes of administrative action, a notice and hearing is essential to a conclusive determination, *Security Trust Co.*, v. *City of Lexington*, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. 87, (tax assessment); *Gage* v. *Medical Society*, 63 N. H. 92, 56 Am. Rep. 492 (physician's license); and this notice and hearing must be a matter of right and not merely of grace; the right must be found in the statute. *People* v. *Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522 (abating a nuisance). This point is not discussed in the principal case.

The power of the Secretary of State to determine what is "public policy" is a grant of unregulated discretion, since neither the statute nor the common law lays down any rules for determining what is "public policy" in such a case. The rule undoubtedly was at one time that where unregulated discretion was conferred, the statute was unconstitutional. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220; *Schaezlein* v. *Cabaniss*, 135 Cal. 466, 67 Pac. 755, 56 L. R. A. 733. But it seems that courts are becoming a little more liberal in this respect. In the *Yick Wo* case the Court held that if there was a possibility of arbitrary and capricious exercise of discretion, the statute was unconstitutional, but now the courts say that they will assume that the officer will act properly, and without declaring the statute invalid, will reverse the decision of the officer if they find an abuse of discretion. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 64 L. ed. 993, 40 Sup. Ct. 572. The courts will especially support an extensive grant of discretion when conferred on a responsible officer, as the President of the United States, *Field* v. *Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294; *Martin* v. *Mott*, 12 Wheat. 19, 6 L. ed. 537. And yet unregulated discretion may be conferred even on the mayor of a city, *Wilson* v. *Eureka*, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. ed. 603, and the cases there cited.

The instant case can be distinguished from *Yick Wo* v. *Hopkins*, which, if not overruled by implication, seems to have been ignored in later decisions (as in *Hall* v. *Geiger-Jones*, *infra*, where it was cited in the brief but not mentioned in the opinion). It is not an inherent right of persons to incorporate, as it is to operate a laundry (as in the *Yick Wo* case) or engage in any other lawful business. From the beginning, corporations, since they needed express authorization before being recognized, have been controlled and regulated by granting or withholding charters. FREUND, STANDARDS OF AMERICAN LEGISLATION, page 40. In the *Yick Wo* case the discretion was clearly abused, while here, although it may have been, that does not appear clearly.

The statute in this case clearly gives the Secretary discretion, more extensive in fact than that granted in any other State. The majority of states hold that his duties as to incorporation are purely ministerial, *McChesney* v. *Batman*, 121 Ky. 303, 89 S. W. 198, and a few that he has limited power to determine the existence

of a given fact, as that stock has been subscribed for in good faith and 50% paid for in cash, *Beach* v. *McKay,* 108 Tex. 224, 191 S. W. 557. It has been held in connection with the Blue Sky laws that the grant of unregulated discretion is not *per se* unconstitutional, the assumption being that the officer will act properly, *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 61 L. ed. 480, 37 Sup. Ct. 217, L. R. A. 1917 F 514, in which Mr. Justice McKenna says, "Besides, it is clearly apparent that if the conditions are within the power of the state to impose, they can only be ascertained by an executive officer." In this case the executive officer was to determine the "business repute" of the applicants and that they were not "about to engage in illegitimate business or fraudulent transactions." Similar statutes were held constitutional in *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559, 61 L. ed. 493, 37 Sup. Ct. 224; *Merrick* v. *Halsey & Co.,* 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. 227. Other statutes were held unconstitutional on other grounds than because of the discretion granted. L. R. A. 1917 F 524 n. If the statute is inflexible, because of narrow specifications of conduct, it will not only fail to meet the changing business conditions and methods, but also will soon be evaded because of the narrow scope of administrative discretion. *Federal Trade Commission* v. *Gratz, supra,* especially the dissenting opinion by Justice Brandeis.

Whether or not the Secretary of State has abused the discretion granted him is another problem and is the other point in issue in this case. If corporations have been organized in the past with even a greater disparity between the common and preferred stock than this one, it shows either that the Secretary has abused his discretion here or that he neglected his duty there, unless there were distinguishing circumstances. The difficulty is that the Secretary has power to determine public policy and that the court cannot find with precision what the bounds of this discretion are, or what constitute distinguishing circumstances.

BASTARDS—RIGHT OF INHERITANCE—PROOF OF PATERNITY.—The plaintiff instituted proceedings to establish his claim to inherit as the bastard heir of the deceased Martin Erickson. During the lifetime of Erickson complaint was filed against him as the putative father of the plaintiff. As the case was about to be called for trial a stipulation, signed by the parties, was filed. Such stipulation stated that the cause was settled; that Erickson was to pay a certain sum in installments; that the prosecuting witness and the state released all claims against Erickson on account of his alleged paternity; and that the court was to render judgment as per stipulation. This the court did. Held, that the paternity was proved. *Erickson* v. *Erickson,* 180 N. W. 664 (Iowa Supt. Ct.).

Illegitimates inherit from the father when the paternity is proved during his life, or when they have been recognized by him as his children, Code § 3385. The record revealed nothing showing a

recognition other than the stipulation, and this was held by the lower court as not being a sufficient "recognition" in writing or otherwise. The question then was, was the paternity proved? A majority of the Supreme Court said that Erickson, by allowing judgment to be rendered on this stipulation, impliedly admitted his paternity and therefore the judgment was proof as contemplated by the statute.

Bastardy proceedings are civil proceedings, *McAndrew* v. *Madison County,* 67 Iowa 54, 24 N. W. 590, to compel the putative father to support the child, *State* v. *Shoemaker.* 62 Iowa 343, 17 N. W. 589. The power of the adult mother to compromise the suit is well recognized and is binding upon her and the county. *Black Hawk County* v. *Cotter,* 32 Iowa 125; *State* v. *Noble,* 70 Iowa 174, 30 N. W. 396; *State* v. *Meier,* 140 Iowa 540, 118 N. W. 792. If a compromise is offered it is not in itself an admission of the charge. *State* v. *Lavin,* 80 Iowa 555, 46 N. W. 553. Neither is an offer to suffer judgment on a compromise. Code § 3819. Of course when the agreement is completed it may be proved in an action for a breach thereof.

When judgment was rendered on the stipulation what was its effect? This question presents two points. The first with regard to the premise of the majority, which is that Code § 5635 authorized judgment in a bastardy proceedings only in the event of "guilt." From this it would seem that a judgment would be conclusive of defendant's guilt. But it appears that the premise is rather narrow because Code § 3819 authorizes money judgments per agreement without limitation as to the nature of the action, while § 5635 does not expressly restrict judgment to the one case where defendant is found guilty. A better view of § 5635 would be that after defendant had been found guilty then only one judgment is authorized. See *State* v. *Lavin,* 80 Iowa 555, 46 N. W. 553. Accordingly it would follow that the judgment in the principal case would be unauthorized under § 5635 and would be void unless authorized by § 3819.

The second point is that an analysis seems to reveal a distinction between a judgment on the merits and one on a stipulation. If, instead of having judgment rendered immediately on the compromise agreement, the bastardy proceedings had been dismissed, and subsequently, upon the defendant's noncompliance with its terms, he had been sued and judgment had been rendered on the contract, could it then be said that the paternity was thereby "proved"? If not, then how can it alter the case that the compromise agreement was forthwith reduced to judgment? The majority opinion concedes that the judgment was rendered upon the stipulation and yet by means of implied admissions draws the inference of Erickson's guilt. The inference seems to be unwarranted because the agreement contained no admissions of fact tending to prove Erick-

son's paternity, and the mere matter of compromise is in itself equivocal. It may mean either an admission of liability or a desire to avoid litigation. WIGMORE ON EVIDENCE, § 1061. It is submitted that by no stretch of reasoning can a greater effect be given to the judgment, as an admission, than to the stipulation upon which it is based.

Aside from the unconvincing reasoning of the majority opinion the practical result of this case is well stated by the minority opinion: "Under the holding of the majority, a defendant in a bastardy proceeding is deprived absolutely of the right to compromise and make settlement and buy his peace and have the matter concluded by a judgment without being conclusively charged with the paternity of the alleged illegitimate child." It is submitted that the minority opinion on this point is the better view.

CONTRACTS—ASSIGNMENT OF CONTRACT—WHAT CONTRACTUAL DUTIES ARE DELEGABLE.—A sold a herd of sheep to B with the agreement that B was to return to A all the lambs raised during that year and also the year's crop of wool from these sheep. The price was stipulated. Shortly thereafter B made an agreement with C, a neighboring farmer, whereby C took a part of that herd and agreed to return to B, at a price stipulated, all the lambs and wool raised that year from that particular group. B made an agreement with D, another farmer, which was similar to the one with C. When the time arrived for B to perform he tendered to A all the wool from these several parts of the original herd. A refused to accept any of it claiming that his agreement with B was personal and the assignments by B to C and D was such a breach as to release him (A). Held, that the assignment was good and that it did not constitute a breach. *Kinser* v. *McMurray,* 181 N. W. 691 (Iowa Sup. Ct.).

The early common law considered contracts as conferring personal rights and therefore no assignment or substitution could be made without the consent of the adverse party. WILLISTON ON CONTRACTS, § 405. Modern judicial decisions and statutes have modified this rule to a very great extent. WILLISTON, §§ 408, 410; Code '97, § 3044. With regard to the liability for non-performance that, of course, remains unaffected, with the initial promisor. *Martin* v. *Orndorff,* 22 Iowa 504. The effect of the decisions and statutes has been to allow the delegation of performance in all but a few situations. WILLISTON ON CONTRACTS, § 411. The rule in these few situations is, where skill, credit, or other personal quality or circumstance is a distinctive characteristic of the thing stipulated for, or a material inducement, the performance cannot be delegated. *La Rue* v. *Groezinger,* 84 Cal. 281, 18 A. S. R. 179; *Abstract Co.* v. *Beechley,* 124 Iowa 146, 99 N. W. 702. As to the matter regarding the credit of the promisor see 4 Iowa Law Bulletin; 53-54. As to the other phase the test of assignability or delegability is whether the promise is put to any disadvantage or

may reasonably object. Can he realize his just expectations from performance by an assignee or substitute? *Devlin* v. *New York,* 63 N. Y. 8, 17; 19 Yale L. Jour. 185. The application of this test is a matter of construction. *La Rue* v. *Groezinger, supra.* The construction in the following situations has been opposed to assignabiliy. A contractual duty to sign, *Cohen* v. *Weber,* 24 Ont. L. R. 171, Ann. Cas. 1912 A 496; or to serve as an agent of an insurance company, *Re Wright* 157 Fed. 544, 18 L. R. A. (N. S.) 193; to prepare abstracts, *Abstract Co.* v. *Beechley, supra;* to install electric devices, *Swarts v. Narragansett Electric Lighting Co.,* 26 R. I. 388; and likewise for the support of a parent by a child, *Bank* v. *Crist,* 140 Iowa 308, 118 N. W. 394. On the other hand contractual duties to do public printing, *Carter* v. *State,* 8 S. D. 153; to sweep streets, *Devlin* v. *New York,* supra; to drill an oil well, *Galey* v. *Mellon,* 172 Pa. 443; and to raise and deliver grapes from a certain vineyard, *La Rue* v. *Groezinger, supra;* have been held to be delegable. In the Pennsylvania case the Court said that the personal performance of the work by the initial promisor could not have been contemplated by the parties at the time the contract was made. The work of necessity required the labor and attention of a number of men and it does not appear that because of his knowledge, experience, or pecuniary ability or for any other reason the initial promisor was especially fitted to carry it on. From a comparison with the above cases it would seem that the instant case would take its place among those regarded as assignable, and in that place the Iowa Court put it.

CONTRACTS—ILLEGAL CONTRACTS—AGREEMENT FOR COMMISSION FOR OBTAINING SUBSCRIPTIONS TO CHARITABLE ORGANIZATION.—The plaintiff seeks to recover damages from defendant, a charitable association, for breach of an alleged contract whereby he was to receive one-half of the subscriptions obtained by his solicitation. Plaintiff claims to have induced a testator to bequeath one thousand dollars to the defendant association and that the defendant refuses to pay him half of the amount as commission, as provided in the terms of the contract. Held, that the plaintiff cannot recover. He failed to make a showing that he complied with the terms of the contract and even had he done so the agreement is void as against public policy. *Jones* v. *American Home Finding Association,* 182 N. W. 191 (Iowa Supreme Ct.).

The first point is merely a matter of construction of the agreement. The Court holds that the contract did not apply to money bequeathed to the association whether as result of the plaintiff's efforts or not, but only to sums collected or enforceable subscriptions received by him.

The second point is the important one, namely that such a contract is void as being against public policy. On this point the case is one of first impression. The Court cites no precedent and a careful search has failed to reveal any. If an agreement binds

the parties or either of them to do, or if the consideration is to do, something opposed to the interests of the public, good morals, or administration of justice, it is opposed to public policy and void. 13 C. J. § 360. Further than this, those contracts which offer a temptation to do that which may injuriously affect the rights and interests of third persons are void on ground of public policy, *Boardman* v. *Thompson*, 25 Iowa 487. These are general rules recognized by all authorities.

In *Re Minneapolis Police Department Relief Ass'n.* 85 Minn. 302, 88 N. W. 977, it was held that funds donated to a charitable organization were trust funds and could not be diverted from the purpose for which they were donated. The Court very clearly held in this case that the necessary expense of managing the association did not come under the head of diverting the funds. In *Hyland* v. *Paving Co.*, 74 Or. 1, 144 Pac. 1160, it was held that a contract to compensate an attorney if he procured a contract from public authorities was void on ground of public policy.

Neither of these decisions actually covers the instant case.

It would seem that apart from authority the reasoning of the principal case is sound. Under the alleged contract, the temptation is offered to an agent operating under such a contract to use various means, both honest and otherwise, to obtain as many subscriptions as possible and thus increase his commission. Second, it tends to work fraud on third parties donating to the association by representing to them that all of this money goes for charity when in fact a large part of it does not. Again, it hardly seems reasonable that men of altruistic inclination should intend that the larger their subscriptions should be the more the agent should be benefited personally. It would seem that their intention in giving a large donation would be that all the more should be available for charity over and above the necessary expenses of administration.

There is a distinction in the case of contracts to pay salaries. The association must pay the reasonable worth of the services of its agents or it could not run. Moreover the salaried agent would not have the temptation to make misrepresentations to prospective donors since subscriptions secured would be of only indirect benefit to him.

STATEMENT OF OWNERSHIP, MANAGEMENT, ETC., OF IOWA LAW BULLETIN

Published four times a year at Iowa City, Iowa. This notice required by the Act of Congress of August 24, 1912.

Editor-in-charge: HERBERT F. GOODRICH, Iowa City, Iowa.

Publisher: State University of Iowa, College of Law, Iowa City, Iowa.

Owners (if a corporation, give names and addresses of stockholders, holding 1 per cent or more of total amount of stock): State University of Iowa, Iowa City, Iowa.

Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities: None.

HERBERT F. GOODRICH, *Editor.*

Sworn to and subscribed before me this 28th day of September, 1921, by HERBERT F. GOODRICH, Editor.

E. REIZENSTEIN,
Notary Public in and for Johnson County, Iowa.
(My commission expires June 30, 1921.)

IOWA LAW BULLETIN

Volume VII JANUARY, 1922 Number 2

LANDOWNER'S DUTY TO STRANGERS ON HIS PREMISES —AS DEVELOPED IN THE IOWA DECISIONS

It is one thing to know a general rule of common law. It is another to know the application of the general rule, its variations and exceptions, in a particular state. Both are important. Without the first, the lawyer becomes the mere tradesman. Worse than that for him, he is often helpless, for with all the gray mule and spotted cow cases to which a benevolent digester directs him he does not sense the legally significant facts so that he can recognize an authority when he sees it. Without the second, even the lawyer with a grasp of fundamentals is at a disadvantage, for a single local case may upset the whole course of a carefully reasoned analysis. This and other discussions of Iowa law which appear in the pages of this magazine are published with the hope that an exposition and analysis of local decisions will be helpful to the profession. In general they blaze no new paths in jurisprudence. If they aid in a better understanding of what we already have their publication is justified.

In the present discussion, it is the purpose to discuss general principles of tort liability governing the occupier of land for harm suffered by outsiders on the premises. I have used the word "strangers" in order to connote a meaning which would exclude a discussion of those who stand in special relations to the landowner, as master and servant, landlord and tenant, and carrier and passenger. Some cases of this kind are cited but only when depending on general rules of law, not limited to the peculiar relation.

Trespassers

It is not necessary here to discuss instances where the law will justify one in entering another's premises without his permission. Authority hardly seems needed for the undisputed rule that "every

unauthorized and therefore unlawful, entry into the close of another is a trespass,'"[1] and an unsupported dictum to the contrary which appears in an early Iowa decision may be disregarded.[2]

To the trespasser the landowner owes no duty to put his premises in safe condition or repair,[3] or even to give warning of latent danger.[4] This is but an instance of the favor with which the landowner has always been regarded by the common law. So long as he stays within his own boundaries, he may, with few exceptions, use the premises as he sees fit. The fact that people do in fact trespass on the land of others puts no obligation on the owner to make things safe for them. But the immunity is given him only in using the premises for his own affairs. If he creates the dangerous condition for the purpose of harming the trespasser he is liable for the latter's injuries. The Iowa "spring gun" decision is a leading case on this point.[5]

This broad immunity from responsibility is available only to the rightful occupant of the land. If the defendant whose dangerous agency has caused another injury is himself a trespasser or a licensee on the land of the owner, he cannot escape liability on the sole ground that the plaintiff's presence on the land was a legal wrong against the owner. The liability will depend upon the defendant's having acted with due care under the circumstances.[6]

Should the general rule granting immunity to the landowner for injuries resulting to trespassers from dangers in his premises apply

---

[1]Ruffin, C. J., in *Dougherty* v. *Stepp*, 1 Dev. & Bat. (N. C.) 371.

[2]The statement is: "It is, perhaps, true that, by walking upon a railroad track at points away from public crossings, persons are not technically trespassers.....A person who, for pleasure or from curiosity, enters a manufactory, and walks among the machinery.....is not a trespasser in a legal sense." *McAllister* v. *Ry. Co.*, 64 Iowa 395, 397. Such a person certainly is a trespasser, unless a license can be implied, a question hereafter discussed.

[3]*Burner* v. *Higman etc. Co.*, 127 Iowa 580; *Davis* v. *Bonaparte*, 137 Iowa 196; *Upp* v. *Darner*, 150 Iowa 403, 407.

[4]A striking instance is *Sutton* v. *W. J. & S. R. Co.*, 78 N. J. L. 17, where the deceased, trespassing on railroad land, stepped upon an unguarded electrically charged rail. No warning of danger had been given. His representative was denied recovery for his death. A dictum to the contrary by McClain, C. J., in *Ambroz* v. *Light and Power Co.*, 131 Iowa 336, 339, is not in accordance with authority.

[5]*Hooker* v. *Miller*, 37 Iowa 613. See also *Davis* v. *Bonaparte*, 137 Iowa 196, 205.

[6]*Connell* v. *Electric Ry. Co.*, 131 Iowa 622. The point is discussed in clearer fashion in *Guinn* v. *D. & A. Tel. Co.*, 72 N. J. L. 276.

when the victim is a child? This question has been the subject of hot controversy and has given rise to a multitude of decisions, referred to as the "Turn-Table" or "Attractive Nuisance" cases. It is not necessary here to review the well known arguments set forth with much vigor, and often asperity, on one side or the other, nor to determine the extent to which the doctrine has been carried in other jurisdictions.[7]

We could think more clearly on this subject if we ceased to camouflage the landowner's liability with a setting of vituperative epithets about one who has "allured," "enticed" or "trapped" innocent children. We need no new rules of law to care for the man who would actually do such an act. The fact is, as everyone knows, that the landowner has the dangerous object on the place in the course of his use of the premises. The existence of something that children like to play with on a man's land does not mean that he invites the children to use it, dicta to the contrary notwithstanding.[8] With equal truth we could say that a railroad invites a pedestrian walking along a muddy road to use its well drained track for his travel.

We should admit that a child who comes without permission to play upon a turn-table or anything else on another's land is technically a trespasser. And children are at law liable for trespasses the same as adults. The admission does not necessarily mean that the proprietor incurs no responsibility by reason of the unwelcome visit. The structure of civilization would not be shaken if the law made an exception in favor of the child by cutting down the landowner's freedom from liability to trespassers. Such a change might impair the logical consistency of our rule. But logic is not necessarily law. "The law is a practical science, having to do with the affairs of life, [and] any rule is unwise if in its general application it will not as a usual result serve the purposes of justice."[9] The whole question seems to be whether it is better policy to leave the landowner with his almost absolute immunity, or to impose a duty on him to safeguard trespassing children too young to care for themselves. The chief difficulty with the answer made by most authorities, that there is an obligation owed to the child, is

[7]Judge Jeremiah Smith, in two well reasoned articles, sets out the negative answer to the question in 11 Harv. L. Rev. 349, 434. Even notes listing cases on the point are too numerous to set out here. They are listed in L. R. A. Index, heading, "Negligence" §§ 23, 23a.

[8]As for example in *Wilmes* v. *R. Co.*, 175 Iowa 101, 108.

[9]Allen, J., in *Spade* v. *Lynn etc. R. Co.*, 168 Mass. 285.

that of determining the extent of the duty. It is common knowledge that nearly everything new is attractive to childish curiosity. A wood pile, garden tools, machinery, fires, ponds, what will not make a setting for a fine new game? Is the landowner, then, to be compelled to lock up everything against youngsters never initiated into the rules of *trespass q. c. f.*? Courts allowing recovery for an injury on a railroad turn-table have not infrequently met with difficulty in deciding how far the doctrine was to be followed.

The Supreme Court of Iowa allowed a trespassing child to recover for injuries sustained on a turn-table in the well known *Edgington* case in 1902.[10] The carefully reasoned and thorough opinion of Weaver, J., reviews the cases and discusses principles. The property owner, says the Court, is not an insurer of the safety of children who come upon the premises. "His obligation is simply that which attaches to every member of society when he undertakes to exercise a personal right in a manner which may affect the welfare or safety of another member,—the obligation of reasonable care." Without quibbling the duty of reasonable care is recognized, despite plaintiff's status as a trespasser. Precautions demanded will vary, naturally, with the degree of danger and the remoteness or proximity of the premises from places where children are to be expected.

It is worthy of note, however, that the Court, with but two exceptions, has denied recovery in every case since the *Edgington* decision that has come before it, where plaintiff's claim was based upon this "Attractive Nuisance" doctrine, though several times it has approved and affirmed the rule of that case.[11] One of

[10] *Edgington* v. *Ry. Co.*, 116 Iowa 410. Two previous turntable cases had been decided for defendant on the grounds of plaintiff's contributory negligence. *Merryman* v. *Ry. Co.*, 85 Iowa 634; *Carson* v. *Ry. Co.*, 96 Iowa 583.

[11] The cases are: *Brown* v. *Canning Co.*, 132 Iowa 631, belt running over cylinder used to elevate corn; *Anderson* v. *Ry. Co.*, 150 Iowa 465, uninsulated electric wires on top of storage house, to which boy had jumped from top of a freight car; *Hart* v. *Brick & Tile Co.*, 154 Iowa 741, shaft in an "old blacksmith shop"; *Wilmes* v. *Ry. Co.*, 175 Iowa 101, bent rail in a heap of railway wreckage; *Smith* v. *Ry. Co.*, 177 Iowa 243, smouldering fire in refuse dump at terminal; *Carlisle* v. *Sells Floto Co.*, 180 Iowa 549, unloading circus near school grounds; *Davis* v. *Malvern L. & P. Co.*, 173 N. W. 262, barbed wire fence surrounding pole carrying electric wires; *Massingham* v. *Ry. Co.*, 179 N. W. 832, cofferdam about an abutment of a railroad bridge; *Blough* v. *Ry. Co.*, 179 N. W. 840, pond or barrow pit on railroad right of way.

the cases where recovery was allowed was another suit to recover for injuries sustained on defendant's turn-table.[12] In the second, recovery was allowed a boy who was hurt when his fingers were caught in a block and tackle arrangement used to hoist a telephone cable.[13] The apparatus was used on a public street near a school, and there was no one to guard it. It is true of course that the child was a trespasser in touching another's property.[14] But he had as much right on the street as defendant, whose defense must have rested on some other doctrine than landowner's immunity. It is not meant to intimate that the decisions subsequent to the *Edgington* case are wrong. The course of decision does show, it is submitted, that our Court is going to be very careful in applying the attractive nuisance doctrine. That is good sense, for in some states the rule seems to have swept the courts off their feet.

One further liability of a landowner for defects in his premises to one coming without permission is to be noted. If the premises adjoin a highway the landowner must not make an excavation or create obstructions so close to the way that travel is unsafe by reason thereof. The true test for liability is said in an English case to be "whether the excavation be substantially adjoining the way."[15] The question seems not to have come up in Iowa. In *Earl* v. *Cedar Rapids et al.*,[16] the plaintiff recovered for injuries sustained in falling into an unguarded cellarway, which projected from land of one of the defendants into the public street. The case does not therefore involve liability for such danger existing entirely on defendant's own land adjoining the highway, nor even the responsibility of one who gives his adjacent premises the appearance of being part of the highway.[17] Authorities in other jurisdictions are abundant enough to establish the duty as a rule of law.[18]

---

[12] *Taylor* v. *Ry. Co.*, 180 Iowa 702.

[13] *Ashbach* v. *Iowa Tel. Co.*, 165 Iowa 473.

[14] Judge Weaver emphasizes this point in the *Edgington* case in discussing another decision based on a street accident, used as an authority for the attractive nuisance doctrine. See pp. 421, 422 of the decision.

[15] *Hardcastle* v. *South Yorkshire etc. Co.*, 4 Hurl. & Nor. 67.

[16] 126 Iowa 361.

[17] On this point, see note in 51 L. R. A. (N. S.) 1215.

[18] Collections of cases may be found in 26 L. R. A. 686; 5 L. R. A. (N. S.) 733.

Trespassers Injured by Acts of Defendant

Liability of the landowner for injuries received through acts done to the trespasser will in many instances depend upon whether the injured person's presence was actually known to the defendant. The trespasser whose presence is unknown to the landowner cannot recover for injuries he receives. The reason is not because by his trespass the plaintiff is guilty of contributory negligence, as our Court has on occasion intimated.[19] An unseen trespassing child too young to be negligent himself cannot recover any more than an adult.[20] The reason the unseen trespasser cannot recover is that no duty is owed to him. This is clearly set out in two Iowa decisions,[20a] and shows that the statement in *Murphy* v. *R. Co.*,[20b] to the effect that the only difference between the duty owed to trespasser or licensee "would be upon the facts constituting the measure of diligence required" is incorrect. There being *no* duty to the trespasser, *no* diligence is required. Since there is no duty, he cannot avail himself of rules of the company requiring signals and a lookout.[20c] "Actionable negligence is the breach of a duty owing by defendant to plaintiff, and where there is no duty there is no negligence," says Judge Deemer.[21] Rules in other states vary. In some jurisdictions landowners, if they are railroads, are required by decision or statute, to watch for trespassers.[22] Our own cases are

[19]In *Masser* v. *Ry. Co.*, 68 Iowa 602. Contributory negligence will be a bar to an action based on defendant's negligence whether plaintiff is a trespasser or not. And some cases may rest on that ground. See *Murphy* v. *R. Co.*, 38 Iowa 539; *McAllister* v. *Ry. Co.*, 64 Iowa 395.

[20]*Burg* v. *Ry. Co.*, 90 Iowa 106; *Thomas* v. *Ry. Co.*, 93 Iowa 248.

[20a]Deemer, J., in *Thomas* v. *Ry. Co.*, 93 Iowa 248, 255, and Salinger, J., in *Papich* v. *Ry. Co.*, 183 Iowa 601.

[20b]30 Iowa 539.

[20c]*Burg* v. *Ry Co.*, 90 Iowa 106.

[21]In *Upp* v. *Darner*, 150 Iowa 403, 406. This is clearly set out by Deemer, J., in *Thomas* v. *Ry. Co.*, 93 Iowa 248, 255, and by Salinger, J., in *Papich* v. *Ry. Co.*, 183 Iowa 601, and of course shows that the statement in *Murphy* v. *R. Co.*, 38 Iowa 539, to the effect that the only difference between duty owed to trespasser or licensee "would be upon the facts constituting the measure of diligence required" is incorrect. There being *no* duty to the trespasser, *no* diligence is required. Since there is no duty, he cannot avail himself of rules of the company requiring signals and a lookout. *Burg* v. *Ry. Co.*, 90 Iowa 106.

[22]For a decision so holding, and discussion, see 2 Iowa Law Bulletin 98. Collections of cases on this point, setting out the varying circumstances when such lookout is required, may be found in 25 L. R. A. 287 and 8 L. R. A. (N. S.) 1069.

clear. Railroads are not required to watch for trespassers; they owe no duty until the uninvited visitor is actually discovered; and it is immaterial whether he be infant or adult.[23] Of course the same exemption from duty would apply to other landowners. Indeed where the courts have declared a duty to watch for trespassers, it seems only to apply to railroads.

This freedom from responsibility for the undiscovered trespasser is not adequately explained by saying that his presence is not to be anticipated.[24] As a matter of fact, people frequently do trespass on the land of others, especially on railroad property, and every one knows it. But the jury may not consider the frequency of trespassing at a given point, even in determining the question of actual knowledge.[25] The reason must be fundamentally the same as the exemption of responsibility for condition of the premises: that it is a socially desirable policy to allow a man to conduct his own lawful business on his own land in his own way, without the burden of watching for and guarding those who come there without permission or right. If this is not sound policy, or if it once was, and is no longer, then the law ought to be changed. But a court would hardly upset a rule so firmly established as this one is and if a change is to be made, it will have to come through legislation. The very important practical question, what facts will change a plaintiff from trespasser to licensee, will be discussed later.

If the trespasser is actually discovered by the landowner, an entirely different situation is presented. Is the proprietor now to be allowed to disregard the rights of this man as a human being because he has come without right? The trespasser is no outlaw, with a price upon his head. Probably mere knowledge of the pres-

[23] *Masser* v. *Ry. Co.*, 68 Iowa 602; *Burg* v. *Ry. Co.*, 90 Iowa 106; *Thomas* v. *Ry. Co.*, 93 Iowa 248; S. C. 103 Iowa 649; S. C. 114 Iowa 169; *Pulley* v. *Ry. Co.*, 94 Iowa 565; *Baker* v. *Ry. Co.*, 95 Iowa 163; *Heiss* v. *Ry. Co.*, 103 Iowa 590; *Earl* v. *Ry. Co.*, 109 Iowa 14; *Purcell* v. *Ry. Co.*, 109 Iowa 628; *Clemans* v. *Ry. Co.*, 128 Iowa 394; *Graham* v. *Ry. Co.*, 131 Iowa 741; *Myers* v. *Ry. Co.*, 152 Iowa 330; *Papich* v. *Ry. Co.*, 183 Iowa 601; *Miles* v. *Ry. Co.*, 184 Iowa 461; *Trotter* v. *Ry. Co.*, 185 Iowa 1045. The rule is the same as to stock trespassing upon a fenced right of way. *Mears* v. *Ry. Co.*, 103 Iowa 203; *Johnson* v. *Ry. Co.*, 122 Iowa 556; *Reynolds* v. *R. Co.*, 159 Iowa 317. Cases on the liability of the railroad for loss of stock on a right of way not fenced as required by statute (Compiled Code 1919, §§ 5074, 5075) need not be here discussed. See 3 McClain's Digest 3397.

[24] As in *Murphy* v. *R. Co.*, 38 Iowa 539.

[25] *Thomas* v. *Ry. Co.*, 93 Iowa 248.

ence of the trespasser would place no duty on the landowner's part to give him warning, even of hidden dangers in the condition of the premises. The law in general requires no man to play the good Samaritan, and it is hard to see how the wrongful presence of the plaintiff on defendant's land would increase the former's rights.[26] But there is a fundamental distinction between failing to help a man and doing him harm, between the priest and the Levite who merely passed by on the other side, and the thieves who beat and wounded the victim in the parable. Failing to do a thing and doing it badly are wholly different things in the eyes of the law.[27]

All courts agree that the trespasser has some rights. He must not be intentionally harmed; even in ejecting him no more force can be used than is reasonably necessary.[28] Beyond this, authorities are divided. One rule, that of the majority, often called the Michigan rule, gives the seen trespasser the protection of ordinary care on the part of the landowner, the usual test for responsibility for injuries sustained through negligence. By the other rule, called the Massachusetts rule, the trespasser can claim only freedom from reckless and wanton misconduct, something very much akin to intentional injury.[29] The Michigan rule gives the trespasser the rights of an ordinary human being, no more, no less. If it is too

[26]See the language of the Court in *Buch* v. *Amory Mfg. Co.*, 69 N. H. 257.

[27]This refers to cases where there is, between the parties no relation, either imposed by law or assumed by the parties, creating a duty of affirmative action. See on the subject of such duties, "The Moral Duty to Aid Others as a Basis of Tort Liability", F. H. Bohlen, 56 Amer. L. Reg. (O. S.) 217.

[28]2 R. C. L. 557, 558. In *Adams* v. *Ry. Co.*, 156 Iowa 31, plaintiff was a trespasser on defendant's premises in a helplessly intoxicated condition. He was ejected and suffered injuries from exposure. The court said that even in exercising the privilege of ejecting him, defendants must exercise reasonable precaution for his safety.

[29]The two rules are discussed, with a strong argument for the Michigan rule in an article "Duty to Seen Trespassers", by Judge Robert J. Peaslee, 27 Harv. L. Rev. 403. Sometimes they are carelessly stated in alternative language as though each meant the same thing. See 20 R. C. L. 60.

Statement of the landowner's liability in terms which thus require the existence of a substantially criminal state of mind as does the "reckless and wanton misconduct" test, is said to have come from the fact that the common law writ of trespass, which was in its essence criminal, included within its scope offences committeed by a landowner upon his own premises. See Prof. F. H. Bohlen, in 69 U. of Pa. L. Rev. 237, 238, March, 1921.

much trouble to take ordinary care to avoid hurting him, he can be ejected. Until that is done, is he not entitled to as much care from the defendant as any stranger?

A long line of Iowa decisions announces and applies to varying facts the rule that after discovering a trespasser upon the premises, there is a duty upon the landowner and his servants to exercise ordinary care to avoid injury.[30] Along with this formidable array of decisions are found scattering cases in which statements appear, usually as gratuitious dicta, announcing the test of intentional wrongdoing, or wanton and reckless misconduct as a criterion for defendant's liability. Some of these come from indiscriminate citations of cases from other jurisdictions, without careful attention to our own decisions.[31] If a clear statement by a judge can ever settle the law, surely the following one by Judge McClain in *Gregory* v. *Wabash Railroad Co.*,[32] should have left no room for vascillation in this State. He is speaking of the duty to a seen trespasser, in answer to an argument raised by defendant who complained of an instruction given by the trial judge.

"It may be true that in some of the cases of this character this court has referred to the willful and wanton character of the acts of railroad employes in failing to take reasonable precautions to avoid injury after the trespasser was seen; but certainly this court has never announced the rule that under such circumstances the company will not be liable unless the conduct of its employes was intentional, willful, or wanton; and, so far as we can discover, the rule uniformly adhered to has been that if, after the employes in charge of the train became aware of danger to a trespasser on the track, they can, by the exercise of such care as a reasonably prudent person would exercise under the circumstances—that is, the highest possible degree of care in view of the fact that human life is involved—avert such danger, it is their duty to do so; and the company will be liable for their failure in this respect, which failure will be attributed to the company as negligence."

This clear statement seems to have been overlooked in a small group of cases since which have reverted to the "wanton and reckless" formula. Where they apply it, however, they say that the

---

[30] *McAllister* v. *Ry. Co.*, 64 Iowa 395; *Masser* v. *Ry. Co.*, 68 Iowa 602; *Clampit* v. *Ry. Co.*, 84 Iowa 71 (*semble*); *Burg v. Ry. Co.*, 90 Iowa 106; *Sutzin* v. *Ry. Co.*, 95 Iowa 304; *Barnhart* v. *Ry. Co.*, 97 Iowa 654; *Neet* v. *Ry. Co.*, 106 Iowa 248; *Purcell* v. *Ry. Co.*, 109 Iowa 628; *Scott* v. *Ry. Co.*, 112 Iowa 54; *Farrell* v. *Ry. Co.*, 123 Iowa 690; *Clemans* v. *Ry. Co.*, 128 Iowa 394; *Graham* v. *Ry. Co.*, 131 Iowa 741; *Myers v. Ry. Co.*, 152 Iowa 330; *Clemens* v. *Ry. Co.*, 163 Iowa 499.

[31] *Gwynn* v. *Duffield*, 66 Iowa 708; *Earl* v. *Ry. Co.*, 109 Iowa 14.

[32] 126 Iowa 230, 238.

finding of "willful negligence" can be sustained by evidence showing lack of due care after the trespasser and his danger are discovered. This reaches the same result as the straight test of negligence, but the language is confusing and inaccurate.[33]

What constitutes the exercise of ordinary care to a seen trespasser will vary with the circumstances. An engineer in charge of a train does not need to stop upon discovery of an object on the track, nor even if he sees that the object is a human being.[34] The engineer may assume that an adult, in apparent full possession of his faculties will get out of the way. It is when it becomes apparent that he is oblivious to danger, or cannot get out of it, that drastic action must be taken.[35] The case is different with children—their very presence on the track denotes danger.[36] Generally the question of the sufficiency of precautions taken is a jury question, and the verdict will not be disturbed when it finds support in the evidence.[37]

One line of decisions is hard to reconcile with the general rule that the seen trespasser may demand due care from the proprietor to avoid injury to him. The case of *Denny* v. *C. R. I. & P. Ry. Co.*[38] presents the typical set of facts. The plaintiff sued for injuries sustained by his minor daughter. She, by misrepresenting herself to be a relative of an employee, had procured a pass on the railroad. While on her return journey, the passenger train collided with a freight train, caused by a misplaced switch. It seems to be granted that this was negligently caused. Yet in the absence of a showing

[33] *Tarashonsky* v. *Ry. Co.*, 139 Iowa 709 (note, too, that the child injured was a licensee); *Trotter* v. *Ry. Co.*, 185 Iowa 1045. *Ambroz* v. *Light & Power Co.*, 131 Iowa 336, seems to go even further, for it talks as if this finding of wantonness might be sustained if steam was suddenly discharged without warning if defendant knew people were reasonably likely to be in front of the pipe. Is there then a duty to a trespasser not discovered, but who could be expected?

The statement of the willful injury rule by Salinger, J., in *Papich* v. *Ry. Co.*, 183 Iowa 601, is not supported by the very authorities given, and is not necessary to the decision.

[34] *Burg* v. *Ry. Co.*, 90 Iowa 106, 121.

[35] *Dufree* v. *Ry. Co.*, 155 Iowa 544. *Accord*, *Rutherford* v. *Ry. Co.*, 142 Iowa 744.

[36] *Burg* v. *Ry. Co.*, *supra*; *Thomas* v. *Ry. Co.*, 114 Iowa 169. See further, due care as to children, *Walters* v. *R. Co.*, 41 Iowa 71; *Sutzin* v. *Ry. Co.*, 95 Iowa 304.

[37] *Clemans* v. *Ry. Co.*, 128 Iowa 394; *Myers* v. *Ry. Co.*, 152 Iowa 330.

[38] 150 Iowa 461.

of willful or intentional wrongdoing by defendant, the plaintiff was denied recovery. This decision seems to represent a general rule—that the injured person in such a case can only claim the right to be free from willful or intentional injury.[39] It is supported by authority even in Iowa where for years there has been a statute making railway companies liable for all damages sustained by any person, including employees, for negligence, mismanagement, or willful wrongs.[40]

Consider the situation on principle and general authority for a moment. It is conceded that a plaintiff in the situation set forth is not a passenger; he is not entitled to an instruction in his favor calling for that peculiar degree of care supposed to be awarded persons of this description.[41] We may call him a trespasser if he fraudulently avoids paying his fare.[42] If the injury comes to him before his is discovered[43] the authorities already discussed would deny a recovery because no duty is owed him. If it occurred through defects in car or track, he could not complain that premises were not made safe for him, under authorities also set out above. But when he is negligently hurt after his presence is known, why is he not entitled to recovery just as much as the man hurt while trespassing on the right of way? If a conductor negligently ejects him from a moving train, the company is liable.[44] Is the case presented different because the particular employee whose negligence caused the injury did not know of the plaintiff's presence? Such knowledge does not seem to be required in order to give the seen trespasser in other places protection from negligence. In a leading case on the subject[45] the plaintiff trespassing in defendant's circus tent, was hurt by the explosion of a giant firecracker, the explosion being part of the entertainment provided. It is exceedingly improbable that the clown who set off the firecracker knew of the presence of this individual boy in the audience. The Court

---

[39] HUTCHINSON ON CARRIERS, 3rd ed. § 1001.

[40] §1307 Code of 1873; § 5090 Compiled Code of 1919. See *Condran* v. *Ry. Co.*, 67 Fed. 522. *Way* v. *Ry. Co.*, 73 Iowa 466, bringing in "gross negligence" as a test was criticized in *Earl* v. *Ry. Co.*, 109 Iowa 14, 17. The "gross negligence" doctrine was repudiated in the *Denny* case, *supra*.

[41] *Way* v. *Ry. Co.*, 64 Iowa 48.

[42] *Stone* v. *Ry. Co.*, 47 Iowa 82.

[43] As was the case in *Graham* v. *Ry. Co.*, 131 Iowa 741.

[44] *Benton* v. *Ry. Co.*, 55 Iowa 496. And see on the liability here the striking case of *Adams* v. *Ry. Co.*, in note 28, *supra*.

[45] *Herrick* v. *Wixom*, 121 Mich. 384.

did not require it. It was enough that his presence was known to entitle him to due care.

Does the law distinguish the trespasser in the car and the trespasser on the track because the former is felt, consciously or unconsciously, to be a greater offender? Trespass on land, especially railroad land, is a most venial offense; everyone commits it on occasions. Evading fare is more serious. Has that influenced the course of decision? If it has, it would seem to be what a colleague calls "maladjusted civil penology." The punishment doesn't fit the crime. For an offense comparatively trivial, for which the punishment would ordinarily be a light fine, this plaintiff must be a cripple for life without redress. The penalty is too heavy for the wrong done.

Licensees

We may consider a licensee one who comes on another's premises for his own purposes solely, with the owner's acquiesence or permission, through no contractual agreement with the owner.[46] With regard to claims for injuries resulting from the condition of the premises, the licensee is little better off than the trespasser. He is not liable at law for his entry. But his situation resembles that of the trespasser in that he can claim from the landowner no general duty to make the premises safe or comfortable for his reception. He takes the place as he finds it. If he insists on looking his gift horse in the mouth, the law will not listen to his complaints about what he has found.[47]

In one respect only does the licensee have an advantage over the trespasser regarding the condition of the premises of the landowner. He is entitled to warning of hidden dangers the existence of which is known to the licensor.[48] Even this duty on the licen-

[46] 29 Cyc. 451.

[47] *O'Donnell* v. *Ry. Co.*, 69 Iowa 102; *Burner* v. *Higman & Skinner Co.*, 127 Iowa 580; *Davis* v. *Bonaparte*, 137 Iowa 196, 205 (note that in this case Judge Deemer, saying that defendant is liable only for intentional or wanton injury is speaking in a case which involved not liability for acts done, but condition of the premises); *Rutherford* v. *Ry. Co.*, 142 Iowa 744, 754 (here it is said, *obiter*, the duty is no higher than to a trespasser. This is not quite accurate); *Wendt* v. *Akron*, 161 Iowa 338; *Wilmes* v. *R. Co.*, 175 Iowa 101. For general collection of cases, see 13 L. R. A. (N. S.) 1126.

[48] 29 Cyc. 450. *Campbell* v. *Boyd*, 88 N. C. 129, is an excellent illustration, though the language goes beyond that necessary to care for the facts. De-

sor's part is sometimes denied.[49] The point seems not to have come up for decision in Iowa, but the duty was recognized in a dictum in one decision.[50] A persuasive analogy for this protection to the licensee is found in cases making a gratuitous bailor of a chattel liable for injuries sustained by the bailee in its use, when, and only when, the bailor knew of a concealed defect and gave no warning.[51] Should not the same rule apply to the permissive use of land?

Turning from responsibility for the premises themselves to acts done to the licensee while on the premises, expressions are not wanting that the only duty to licensees is to refrain from reckless and wanton injury.[52] But Iowa cases are clear that the duty is higher than this. Due care must be used to avoid injuring the licensee by affirmative acts of negligence.[53] This is to be expected, when the seen trespasser is given such protection. But the licensee may not only ask that care be used with regard to him after his presence is known, but that due care be used to discover him as well. This is clear under the Iowa decisions, however confused

---

fendant watched plaintiff, a licensee, start across a bridge which defendant knew to be unsafe, and which did in fact collapse and injure the licensee.

[49]*Watson* v. *Ry. Co.*, 41 Colo. 138, 92 Pac. 17. The danger in this case was perfectly open however. In 20 R. C. L. 59 the duty as to trespassers and licensees is said to be the same as to condition of premises. It is doubtful from the very general language whether this particular point was considered.

[50]*Wendt* v. *Akron*, 161 Iowa 338, 345, cited in *Wilmes* v. *Ry. Co.*, 175 Iowa 111, 113.

[51]See *Johnson* v. *Bullard Co.*, 111 Atl. 70 (Conn.), and comment, with citation of cases, in 19 Mich. L. Rev. 93 (Nov. 1920), and 6 Cornell L. Quart. 86 (Nov. 1920).

[52]"His presence on the company's land being merely permissive,..... the only duty which the company owed him was to abstain from acts willfully injurious." *Fitzpatrick* v. *Cumberland etc. Co.*, 61 N. J. L. 378.

[53]Cases in the following note are applicable here. See in addition *Reifsnyder* v. *Ry. Co.*, 90 Iowa 76; *Scott* v. *Ry. Co.*, 112 Iowa 54; *Croft* v. *Ry. Co.*, 132 Iowa 687; *Croft* v. *Ry. Co.*, 134 Iowa 411. *A fortiori*, one who is on the premises as a licensee must exercise care with regard to those rightfully there. *Fishburn* v. *Ry. Co.*, 127 Iowa 483. It is hardly necessary to add that the licensee may preclude himself from recovery by his own contributory negligence. *Richards* v. *Ry. Co.*, 81 Iowa 426.

authority may be elsewhere,[54] and careless dicta to the contrary may be disregarded.[55]

The broad distinction then, is between the duty to maintain safe premises, which the licensee may not claim, and the duty to refrain from affirmative acts of negligence, which he may. Can a licensee complain of injuries suffered by a change in the condition of the premises, which makes them less safe for him than at the time the permission was granted? Suppose that the plaintiff, by acquiescence, was allowed to cross a piece of land which the owner used in stone quarrying operations. Could he complain if in the course of the business the operations gradually extended toward the path so it eventually became unsafe to use? Would it not be a stronger case for him if the change was made suddenly, without warning, and he was hurt? Even on such facts recovery has been denied.[56] But there is good authority holding that a sudden change making the premises unsafe, when made without warning, gives an injured licensee a cause of action.[57]

The point has had little discussion in Iowa. It has been held that one who dug a well on unfenced land, in a county where there was no enactment prohibiting stock from running at large, and did not guard it, was liable for the loss of a horse which fell in.[58] The case of *Wendt v. Akron*[59] comes fairly close to the point. The plaintiff by defendant's permission or acquiesence, which it had power to grant, had placed certain cellar and area ways in the highway. He maintained that the defendant, by carelessly making

[54]*Clampit* v. *Ry. Co.*, 84 Iowa 71, a leading case in this State; *Thomas* v. *Ry. Co.*, 103 Iowa 649, also a strong decision; *Heiss* v. *Ry. Co.*, 103 Iowa 590; *Tarashonsky* v. *Ry. Co.*, 139 Iowa 709.

[55]As in *Papich* v. *Ry. Co.*, 183 Iowa 601, 610.

[56]*Fox* v. *Warner-Quinlan etc. Co.*, 204 N. Y. 240, 97 N. E. 497, criticized in 25 Harv. L. Rev. 667.

[57]See *Carskaddon* v. *Mills*, 5 Ind. App. 22, 31 N. E. 559; *Morrow* v. *Sweeney*, 10 Ind. App. 626, 38 N. E. 187; *Wheeler* v. *St. Joseph etc. Co.*, 66 Mo. App. 260; *Lepnick* v. *Gaddis*, 72 Miss. 200, and cases cited in 13 L. R. A. (N. S.) 1126.

[58]*Haughey* v. *Hart*, 62 Iowa 96. The Court assumed the horse was rightfully on the land. Compare *Beinhorn* v. *Griswold*, 27 Montana 79. There too, the owner was not liable for the trespasses of the cattle on defendant's land. But the position was taken that the cattle were no better than trespassers, and the landowner was not liable for their death from drinking cyanide solution left in open vats on his land.

[59]161 Iowa 338.

changes in grades and gutters, caused his premises to be flooded, to his damage. A judgment in his favor was affirmed.

License Implied Through Use.

It is apparent that while the position of trespassers and licensees are alike in many respects with regard to their claims against a landowner, yet there is much practical difference in their rights. The question comes up most frequently in cases where an injury has occurred on a railroad right of way. Some one has been run over by a train. It is claimed that the defendant's employees did not see him in time to avert the accident. If the victim was a trespasser, that is a complete answer to his claim for damages. If he was a licensee, under our decisions, he can insist that it was defendant's business to use care to discover him, and may recover if they were negligent in that respect, provided that he was not himself contributorily negligent.[60] Very seldom would a person in such a situation be able to show an express permission from the railroad company to use its land as a thoroughfare. But in every town there are portions of the right of way where public use is so frequent that well defined paths are worn along the tracks. Is one using such a path to be called a trespasser?

It is said to be the general opinion that an invitation (and presumably permission) cannot be implied from a mere toleration of trespassers.[61] Here is an instance where local authority is of extreme importance. Our Supreme Court has said that something more than mere use must be shown to make out a license. There must be something from which consent may be inferred.[62] But this statement alone is misleading, because the something more does not require any affirmative act of assent on the landowner's part. Many cases have allowed the jury to find a license where property

[60] If he was, then his only chance for recovery is under the Last Clear Chance doctrine, which is applicable in Iowa only when the plaintiff's peril has been discovered. This is discussed in 5 Iowa Law Bulletin, p. 36.

[61] 20 R. C. L. 64.

[62] *Wagner* v. *Ry. Co.*, 122 Iowa 360, 366. *Accord*, *Masser* v. *Ry. Co.*, 68 Iowa 602; *Burg* v. *Ry. Co.*, 90 Iowa 106.

[63] *Evans* v. *R. Co.*, 21 Iowa 374 *(semble)*; *Murphy* v. *R. Co.*, 38 Iowa 539; *Masser* v. *Ry. Co.*, 68 Iowa 602; *Richards* v. *Ry. Co.*, 81 Iowa 426; *Clampit* v. *Ry. Co.*, 84 Iowa 71 (a leading case); *Thomas* v. *Ry. Co.*, 93 Iowa 248; *Thomas* v. *Ry. Co.*, 103 Iowa 649; *Booth* v. *Union Terminal Co.*, 126 Iowa 8; *Croft v. Ry. Co.*, 132 Iowa 687; *Caldwell* v. *Ry. Co.*, 138 Iowa 32; *Tarashonsky* v. *Ry. Co.*, 139 Iowa 709.

has been constantly used, with the knowledge of the landowner's employees, (usually a railway) and no objection has been made thereto.[63] "It is the knowledge of the constant use of the tracks that binds the railroad company."[64] Nor do these cases require knowledge on the part of important officials that the use is being made, though in some of the cases the plaintiff's case has been helped by this, or other facts additional to the known custom.[65] It is a pertinent observation that most of the cases have come before the Supreme Court after a finding of a license by the jury. If use, plus knowledge of the use without protest, will allow a jury to infer a license the plaintiff will seldom fail on this ground. And just that seems to be the rule of our decisions. Limitations on its application are set out in the note.[66]

Invited Persons

The chief difficulty met with in determining the protection owed by the landowner to "invited persons" or "invitees," is in ascertaining who comes within that class. The orthodox statement is something like this:

"But if [the landowner] expressly or by implication invites others to come upon his premises, it is his duty to be reasonably sure that he is not inviting them into a place of danger, and to this end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."[67]

---

[63] *Booth* v. *Union Terminal Co.*, 126 Iowa 8, 13.

[64] *Clampit* v. *Ry. Co., supra; Thomas* v. *Ry. Co.*, 103 Iowa 649; *Croft* v. *Ry. Co.*, 132 Iowa 687.

[65] Where a railway company had provided two safe means of entrance and exit from the station, even the persistent use of a path used by people as a short cut will not be a foundation for an inference that such use was permissive. *Heiss* v. *Ry. Co.*, 103 Iowa 590; followed in *Wagner* v. *Ry. Co.*, 122 Iowa 360, S. C. 124 Iowa 462, the railroad having provided a safe place for people to walk, cinder paths between the tracks, the license was limited to use of these paths. *Cf. Pulley* v. *Ry. Co.*, 94 Iowa 565. And where a path the use of which is licensed crosses a track, the license is suspended while the path is obstructed by cars. There is no license to crawl under. *Wagner* v. *Ry. Co., supra; Papich* v. *Ry. Co.*, 183 Iowa 601, 608.

Judge Deemer in *Rutherford* v. *Ry. Co.*, 142 Iowa 744, says that the owner of stock which has escaped on the railroad right of way is licensed to go thereon to recover it.

[66] This is from *Upp* v. *Darner*, 150 Iowa 403, 407. Equally broad inclusive language may be found in *Wilsey* v. *Jewett*, 122 Iowa 315, and in *Gardner* v. *Waterloo etc. Co.*, 134 Iowa 6. For similar statements see 20 R. C. L. 55; 2 Cooley on Torts, 3rd. ed. 1259.

The looseness of this phraseology can be demonstrated by putting two hypothetical cases. A, a landowner, sees his neighbor B cut across his back yard each day on his way to town, and makes no objection. This is sufficient, under Iowa decisions, to furnish a basis for inference that B's use is permissive. But it puts A under no further obligation with regard to the premises than to give notice of concealed dangers known to him. Presumably B's status would not change if he asked and received permission from A to use his yard as a thoroughfare. Now suppose that A, in a spirit of neighborliness says to B, "Don't you want to make use of my yard as a short cut to town?" Does that make B when he accepts, an invited person in the eyes of the law and impose upon A the obligation to keep the premises in repair for B?

Civilization will not come to an end whichever way this case is decided. But the point has practical importance and we ought to know the law with certainty. Solution should not be difficult when the exact issue is defined. Our landowner A gets nothing out of B's use of the premises in either of the cases supposed. In either case it is a pure gratuity on A's part; B does not use the path because A asks him to, but because it is convenient for him and for his interest to do so. Why then put on A the burden of making things safe for B? Would not the more reasonable rule be to place the affirmative obligation for care of the premises on the landowner only when the visitor's business concerns the landowner? The test would be, not whether the visitor comes by acquiesence (thus being a *bare* licensee,) or by outright invitation, but what does he come for? Is it an errand in which defendant has an interest?[68] Professor Bohlen thus states it:

"It is submitted that while everyone is bound to refrain from action, probably injurious to others, no duty to take affirmative precautions for the protection of those voluntarily placing themselves in contact with him is cast upon any one save as the price of some benefit to him."[69]

General statements, then, about a duty to persons present on land "by invitation express or implied," while good enough in their way where the plaintiff is clearly a business visitor, leave the exact question unsettled. It is not disputed that there may be found

[68]This line of argument is well developed in the brief of Mr. John L. Thorndike in the Massachusetts case of *Stevens* v. *Nichols*, 155 Mass. 472. It is reprinted in the report of the case which appears in AMES AND SMITH, CASES ON TORTS (Pound's ed.), p. 214.

[69]53 American L. Reg. (O. S.) 209, 220. In the discussion the author develops the growth of the law upon which this generalization is based.

more exact statements making the fact of invitation and not the nature of the business as the test of the duty. The following is a sample:

"The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby."[70]

On the other hand note the careful statement in SHEARMAN AND REDFIELD ON NEGLIGENCE:[71]

"The occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, *for the transaction of business, or for any other purpose beneficial to him*....."

So Judge Cooley, who in one place states in the broad language the rule as to invitation, says later on,[72]

"An invitation may be inferred when there is a common interest or mutual advantage, a license when the object is the mere pleasure or benefit of the person using it."

And a difference in duty based upon the nature of the errand that brings a stranger upon an owner's premises, finds adequate support in the cases.[73]

All this goes to establish as the legal meaning of "invited person" not that of common parlance, but the description of one who comes on premises in connection with the enterprise carried on there; the invited person is a "business guest" if a wide meaning be given the word business. It is worth noticing that however

---

[70]Bigelow, C. J., *obiter*, in *Sweeny* v. *Old Colony R. Co.*, 92 Mass. 368. See the explanation of this decision in *Plummer* v. *Dill*, 156 Mass. 426, 430. *Atlanta etc. Co.* v. *Coffey*, 80 La. 145, applies Judge Cooley's broad language literally. *Accord*, *Central R. Co.* v. *Robertson*, 95 Ga. 430.

[71]6th ed. § 704. The italics are my own.

[72]COOLEY ON TORTS, 3rd ed., 1265.

[73]"The class to which the customer belongs includes persons who go .....upon business which concerns the occupier, and upon his invitation, express or implied". Willes, J., in *Indermaur* v. *Dames*, L. R. 1 C. P. 274. For careful judicial language to the same effect, see, Marshall, J., in *Hupfer* v. *Nat. Distilling Co.*, 114 Wis. 279; Vickers, J., in *Pauckner* v. *Wakem*, 231 Ill. 276, 279; Gaynor, J., in *Forbrick* v. *General Elect. Co.*, 92 N. Y. Supp. 36.

On this ground it has recently been decided in Wisconsin that a social guest, injured by reason of an alleged dangerous condition in the host's premises, could not recover. *Greenfield* v. *Miller*, 180 N. W. 834, commented upon 19 Mich L. Rev. 572.

broadly the statement is made in our Iowa decisions about a landowner's duty to those "present by invitation express or implied" all the cases allowing recovery have been those of plaintiffs present on business in some way connected with defendant's beneficial use of the premises.

Once the persons entitled to protection are ascertained, the rule is clear enough. Visitors of this class are entitled to call for reasonable care on the part of the landowner to protect them from harm resulting from the condition of the premises[74] whether the peril is known to the landowner or could have been discovered

---

[74]*Burk* v. *Walsh*, 118 Iowa 397, customer in a store falls down an unguarded elevator shaft. Even if he came in by a way not open to the public, he is entitled to protection once having reached the place where the public is invited to come; *Wilsey v. Jewett*, 122 Iowa 315; retailer's clerk goes to wholesaler's wareroom for goods, falls down an unguarded shaft in a dark room; *Gardner* v. *Waterloo etc. Co.*, 134 Iowa 6, employee of lumber company brings ordered merchandise to defendant's premises and falls into unguarded elevator shaft; *Burner* v. *Higman etc. Co.*, 127 Iowa 580, drayman coming for goods falls into unguarded elevator shaft; *Young* v. *People's Gas etc. Co.*, 128 Iowa 290, postman goes to defendant's car barn to pick up mail from boxes carried on street cars in accordance with contract between postal authorities and defendant, and falls into open pit; *Snipps* v. *R. Co.*, 164 Iowa 530, plaintiff injured by explosion of gas trying to start pump to water stock in defendant's yards; *Gilbert* v. *Hoffman*, 66 Iowa 205, plaintiff admitted as guest in hotel without being warned of the known existence of small pox therein.

The customer in a store is a typical case of an "invited person" and details of the duty owned him have been pretty well worked out. See collections of cases in 21 L. R. A. (N. S.) 456; L. R. A. 1915 F. 572.

The plaintiff, to recover for injuries caused by condition of the premises, must have received them while in that part where, he, or people generally, could rightfully go. "The liability extends no further than the invitation". See collection of cases in 14 L. R. A. (N. S.) 1119. The nearest case found in Iowa is *Oaks* v. *Ry. Co.*, 174 Iowa 648.

Most of the cases involving the responsibility of railroad companies for failure to provide adequate lights, platforms, depots and the like are instances of this same duty. While some of the cases where recovery for injuries is sought against the company may turn on the special relation of carrier and passenger, most of the rules are equally applicable to protect a person coming to the premises to send a telegram, get information about freight rates or call for an express package. A safe place to alight from trains must be provided; *McDonald* v. *R. Co.*, 26 Iowa 124; *Merryman* v. *Ry. Co.*, 135 Iowa 591; but this does not include personal assistance usually; see also on this *Raben* v. *Ry. Co.*, 74 Iowa 732, but if assistance is given, it must not be given carelessly, *Ray* v. *Ry. Co.*, 163 Iowa 430; *McGovern* v. *Ry. Co.*, 136 Iowa 13. Care must be

by him in the exercise of due care.[75] The protection to which the visitor is entitled extends not only to the premises themselves, but to what is done there, even by third parties, if the defendant in the exercise of due care could have anticipated the danger and guarded against it.[76] Our plaintiff may also demand that due care be taken in the doing of affirmative acts by the owner or his servants on the premises not only after he is known to be there, but also if in the exercise of care his presence could have been discovered.[77]

---

used to provide safe access to trains, *Mattieson* v. *Ry. Co.*, 125 Iowa 90; *Dieckmann* v. *Ry. Co.*, 145 Iowa 250. Likewise, due care for proper lighting, *Hiatt* v. *Ry. Co.*, 96 Iowa 169; *Drummy v. R. Co.*, 153 Iowa 479; *Whitman* v. *Ry. Co.*, 153 N. W. (Iowa) 1023; *sed quaere* in this case whether plaintiff was entitled to such protection, see comment in 2 Iowa Law Bulletin 40; and a safe means of exit must be exercised, *Cotant* v. *Suburban Ry. Co.*, 125 Iowa 46. Ordinary care is the limit of the obligation; there is no insurer's liability. *McNaughton* v. *Ry. Co.*, 136 Iowa 177.

[75] *Connolly* v. *Des Moines Inv. Co.*, 130 Iowa 633. See *Garfield etc. Coal Co.* v. *Rockland etc. Co.*, 184 Mass. 60, 67 N. E. 863, for an instance.

[76] So a railroad is liable for rape committed upon a passenger by a brakeman, *Garvik v. Ry. Co.*, 131 Iowa 415; and an assault on a passenger by a brakeman, even though the latter is actuated by the motive of personal revenge. *Fagg* v. *R. Co.*, 175 Iowa 459. But not for an assault by strangers that there was no reason to anticipate, *Felton* v. *Ry. Co.*, 69 Iowa 577. The same responsibility has been applied in other than carrier-passenger cases. Thus a company maintaining an amusement park is liable to a colored patron for injuries from an attack from a crowd of hoodlums, where defendant knew of the threatened danger, but failed to warn the plaintiff; *Indianapolis St. Ry. Co.* v. *Dawson*, 31 Ind. App. 605, 68 N. E. 909. A pool-room proprietor was held liable to a customer for injuries in a brawl engaged in by fellow patrons in *Moone* v. *Smith*, 65 S. E. 712. (Ga.) In *Williams* v. *Mineral City Park Assn.*, 128 Iowa 32, the plaintiff, a patron of defendant, was struck by a bottle dropped or thrown by a stranger. The Court refused to interfere with a jury's finding on the evidence returning a verdict for defendant. The duty was recognized.

Cases of the responsibility of the proprietor of a theatre, fair, or other places of amusement furnish the most picturesque examples of the duty of the land occupant to patrons. For collections of cases see 3 L. R. A. (N. S.) 1132; 19 *ibid* 772; 32 *ibid* 713; 42 *ibid* 1070. The cases in these annotations treat of the duty as to the premises themselves, and also the responsibility for failure to protect patrons from the acts of performers and fellow seekers of entertainment.

[77] *Weymire* v. *Wolfe*, 52 Iowa 533, saloonkeeper expels a helplessly intoxicated customer who suffers from exposure; *Watson* v. *Ry. Co.*, 66 Iowa 164, teamster unloading lumber injured when car is backed against lumber car; *McMarshall* v. *Ry. Co.*, 80 Iowa 757, conductor on a railroad

Established rules governing contributory negligence are applicable.[78] The Iowa decisions are set forth in the notes.

The landowner's liability for unsafe premises brought about by lack of adequate precaution in work done by an independent contractor is a troublesome question to settle. In *Wood* v. *Indept. School District*[79] the defendant contracted with a firm to dig a well in the school house yard. Certain machinery used in the work was negligently left unguarded, and the plaintiff, a pupil in the school, was injured while playing on the machinery. The Court held the district not liable, thus stating the rule:

"Where work is contracted to be done which is not of itself dangerous, but becomes so by the negligence of the contractor, the employer is not liable for injuries resulting therefrom; but if the work is dangerous of itself, unless guarded, and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard it himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor. In the case at bar, the work to be done was not dangerous; it was the machinery with which it was done that was dangerous."[80]

If this kind of a municipal corporation was liable for defective premises at all[81] it is hard to see how it could escape liability for the condition of its premises merely because the condition was created by the contractor. That defence has been raised in some of the cases where a proprietor of an amusement place has been sued for damages from injuries received by patrons during the course of a performance. The defendant says the show troupe was under

---

injured while stepping on defendant's adjoining track to signal; *Carver* v. *Ry. Co.*, 120 Iowa 346, mail carrier hit by mail sack carelessly thrown from train; *Reilly* v. *Ry. Co.*, 122 Iowa 525; *Christiansen* v. *Ry. Co.*, 140 Iowa 345, plaintiff run into when he went forward to look after his stock when train stops.

The rights of persons at railway crossings might be referred to here. The cases are not directly in point however, because even at a private crossing the traveller goes upon the property not by defendant's permission or invitation but in his own right. See on the general duty *Bettinger* v. *Loring*, 168 Iowa 103; *Dombrenas* v. *Ry. Co.*, 174 N. W. 596; private crossing, *Ressler* v. *Ry. Co.*, 152 Iowa 449.

[78] *Bryson* v. *Ry. Co.*, 89 Iowa 677; *Waterbury* v. *Ry. Co.*, 104 Iowa 32.

[79] 44 Iowa 27.

[80] The rule was approved in *Van Winter* v. *Henry County*, 61 Iowa 684, and applied to make a county liable for a dangerous highway.

[81] A school district is not liable for personal injuries sustained on account of the negligent construction of its school-house, or negligence in failing to keep it in repair. *Lane* v. *District Township*, 58 Iowa 462. See also DILLON, MUNICIPAL CORPORATIONS, 5th ed., §§ 1638-1640.

the management of an independent contractor, and he is not liable. But he is held if he failed to take reasonable precautions for his patrons, to whom he owes an affirmative duty which cannot be delegated.[82] The rules of master and servant, requiring the employer to furnish proper tools and a reasonably safe place to work are other instances of this non-delegable duty. The employer is liable if the duty is not performed, no matter in whose hands the job of satisfying legal requirements is put by him.[83] The Iowa Court, in the case discussed, was quoting a form of the rule applied to employers of independent contractors where no *affirmative* duty was owed the particular plaintiff, but where responsibility is sometimes imposed despite that for acts done by the contractor resulting in another's injury.[84] In a later (and the only other) decision, our Court shows a clear understanding of the nature of the liability of the owner of premises.[85]

The responsibility of the lessor or vendor of property may be treated very briefly. After sale and when the premises are in possession of the purchaser, the former owner is not liable to one coming thereon for injuries through an open source of danger existing when the premises were sold.[86] It is a general rule that a lessor is not liable to a lessee for open defects existing at the time of the lease.[87] General responsibility of landlord to tenant is not within this discussion. One well considered case has discussed the question of the lessor's responsibility to those coming upon the premises on business with tenants where the lessor retains control of part of the property. Judge Deemer announced the general rule that the one who occupies the premises is alone liable, for he is bound to keep them in repair. There are, he said, three exceptions; (1) where the landlord retains control over the part of the premises where the accident takes place; (2) where he and the

[82] See cases referred to in note 76 *supra*.

[83] MECHEM ON AGENCY, 2nd ed., §§ 1639-1641.

[84] The difficulty of this application of liability and the basis for it are clearly discussed in Dean E. R. Thayer's "Liability Without Fault", 29 Harv. L. Rev. 801, 808 *et seq.*

[85] *Cramblitt* v. *Percival-Porter Co.*, 176 Iowa 733. The landlord of an apartment house retained control of halls and stairways. A contractor engaged in wiring the building took up a floor board and failed to replace it and the tenant fell in the hole. Though the suit was brought against the agent of the property, the landlord's liability is also discussed.

[86] *Upp* v. *Darner*, 150 Iowa 403.

[87] *Holton* v. *Waller*, 95 Iowa 545, *Willis* v. *Snyder*, 180 N. W. 290.

tenant are in joint control; (3) where the defect at the time of the lease constituted a nuisance. In the case itself there was found such reservation of control on the part of the landlord that a duty was owed to one who came on business to the part controlled by the lessor.[88]

Finally, there is the question of liability of a landowner to policeman, fireman and similar visitors. They often come for the benefit of the landowner, but they enter by public authority and not his permission. And often, too, they enter under circumstances that afford little opportunity for precautions to make the premises safe. There are no Iowa decisions. Authority generally has held that the landowner owes no affirmative duty to this class of visitors, apart from statute,[89] but a late New York decision allowed a fireman to recover who fell into unguarded coal hole in a paved driveway on the defendant's property.[90]

HERBERT F. GOODRICH.

---

[88]*Burner* v. *Higman etc. Co.*, 127 Iowa 580. A discussion of and authorities upon this point may be found in SHEARMAN AND REDFIELD ON NEGLIGENCE, 6th ed., § 708 *et. seq.*, and a series of annotations in L. R. A. 1916 F 1123. See also the well stated decision by Stevens, J., in *Willis* v. *Snyder*, 180 N. W. 290, which involved the landlord's liability to a guest of a tenant.

[89]See 30 L. R. A. (N. S.) 60 and L. R. A. 1916 B 792 for collections of cases.

[90]*Meiers* v. *Fred Koch Brewery*, 127 N. E. 491. The decision is commented upon in 30 Yale L. Jour. 93; 34 Harv. L. Rev. 87; and is made the basis of a discussion by Professor F. H. Bohlen, beginning in 69 U. of Pa. L. Rev. 142, January 1921.

REGULAR ENTRIES, BOOKS OF ACCOUNT, AND THE IOWA STATUTES

Regular Entries

The rule of evidence which provides for the introduction of entries by persons since deceased, made in the regular course of business is an exception to the Hearsay Rule. Such evidence has all the elements of hearsay; it is not testimony made in court, under oath, in the trial of a case in the presence of the adverse party, and is not subject to cross-examination. This exception is sometimes confused with the exception which provides for the introduction of books of account as evidence, because the entry is apt to be one in a book of accounts. But the reason for this exception is entirely different from that as to account books. The latter exception referred originally to books of account kept by one of the parties to the action; their introduction was rendered necessary because the party himself was disqualified as a witness because of his interest in the case and he had no other evidence of the transaction.[1]

But a regular entry (or other memoranda) made by some one other than a party to the action would be admissible to refresh the memory of the entrant, or as memorandum of past recollection, if the entrant were alive and in court.[2] It is the death or absence of the entrant that creates the necessity for this exception. As the testimony of the entrant is unavailable, the entry is admitted as a substitute.[3] The entry must have been made in the regular course of business,[4] at or near the time of the transaction,[5] by one who has knowledge of the transaction,[6] and in some states there must be evidence that he had no motive to misrepresent.[7] As a general rule the entrant must be dead,[8] but some courts hold that it is sufficient if he has become insane.[9] Absence from the jurisdiction is also generally sufficient.[10] Mere sickness is not enough.[11]

---

[1] Wigmore on Evidence, § 1537.
[2] *Graham* v. *Dillon*, 144 Iowa 82; *State* v. *Brady*, 100 Iowa 191, at 201.
[3] Wigmore, § 1521.
[4] Wigmore, § 1523.
[5] Wigmore, § 1526.
[6] Wigmore, § 1530.
[7] Wigmore, § 1527.
[8] Wigmore, § 1521.
[9] *Union Bank* v. *Knapp*, 3 Pick. 96; *Bridgewater* v. *Roxbury*, 54 Conn. 217.
[10] Wigmore, § 1521.
[11] *Taylor* v. *Railroad Co.*, 80 Iowa 435.

The entries are considered reliable because a clerk's habit is to be accurate; a mistake means additional trouble, is almost certain to be detected, and is apt to bring censure and disgrace upon him.[12] The rule is well established in England,[13] and has been generally adopted in this country.[14]

In Iowa there has been a statute since the Code of 1851, which has been construed to cover the introduction of regular entries of persons since deceased.[15] The section also applies to entries and other writings by persons, since deceased, when the entry was against the interest of the person making it. As regards entries and declarations against interest, the statute has not been held to be in derogation of the common law, but rather as declaratory of only a part of the common law rule. Thus, though the statute says, "entries and other *writings*", oral declarations against interest have been allowed to be proved, after the declarant's death.[16] Again, though the statute refers to entries against interest by persons since deceased, it has been held that a declaration against

---

[12]WIGMORE, § 1522.

[13]3 BLACKSTONE'S COM. 368.

[14]1 GREENLEAF, EVID., § 115; WIGMORE, § 1521 to 1531; *Nichols* v. *Webb*, 8 Wheaton 326 (notary); *Chaffee & Co.* v. *United States*, 18 Wallace 516, at 541 (statement of the rule); *Beatre* v. *Simpson*, 4 Ala. 305 (clerk); *Elliott* v. *Dycke*, 78 Ala. 150 (clerk); *Livingston* v. *Tyler*, 14 Conn. 287 (clerk); *Dow* v. *Sawyer*, 29 Maine 117 (agent); *Billings* v. *Beggs*, 114 Maine 67, (bookkeeper); *Reynolds* v. *Manning, Stimpson & Co.*, 15 Md. 510 (clerk); *Welsh* v. *Barrett*, 15 Mass. 380 (bank messenger); *Jones* v. *Howard*, 3 Allen 223 (agent); *Union Bank* v. *Knapp*, 3 Pick. 96; *Maconb* v. *Wilkinson*, 83 Mich. 486; *Lassone* v. *Railroad*, 66 N. H. 345 (wheelwright); *Roberts* v. *Rice*, 69 N. H. 472; (insurance agent); *Leland* v. *Cameron*, 31 N. Y. 115; *Fisher* v. *Mayor*, 67 N. Y. 73; *Ocean Nat. Bank v. Call*, 9 Hun. 239; (bank clerk); *Bentley* v. *Falkner*, 49 N. Y. S. 691, (bank clerk); *Dicken* v. *Winter*, 169 Penn. St. 162 (teamster); *Bacon* v. *Vaughn*, 34 Vt. 73; *Lewis* v. *Norton*, (Va.) 1 Washington 77, (clerk); *Gravel Co.* v. *Contract Co.*, 70 Wash. 123 (clerk); *Vinal* v. *Giman*, 21 West Va. 301 (agent).

[15]Code § 4622 provides: "The entries and other writings of a person deceased, who was in a position to know the facts therein stated, made at or near the time of the transaction, are presumptive evidence of such facts, when the entry was made against the interest of the person so making it, or when made in a professional capacity or in the ordinary course of professional conduct, or when made in the performance of a duty specially enjoined by law."

[16]*County of Mahaska* v. *Ingalls*, 16 Iowa 81; *Scott County* v. *Fluke*, 34 Iowa 317.

interest might be proved where the declarant was shown to be alive but insane.[17]

But as to the introduction of entries made in the regular course of business by persons since deceased, the statute has been construed to be in derogation of the common law, and not merely declaratory of it. The statute disregards entirely entries made in the ordinary course of business by non-professional business men, their clerks and agents, who are dead at the time of the trial.[18] Such cases comprise the bulk of those covered by the general rule which prevails in other jurisdictions.

The proposition was directly passed upon by the Supreme Court in the case of *Cummings* v. *Penn. Fire Ins. Co.*[19] An entry made by an insurance agent in the regular course of his business as agent for the company was offered in evidence, the agent being dead. It would seem that this entry was clearly admissible under the general rule as laid down by the cases above cited. But the Court held that this entry was not admissible, first, because it was not against the interest of the agent, and second, because an insurance agent was not a professional man. The cases of *Nichols* v. *Webb, supra,* and *Welsh* v. *Barrett, supra,* were cited to the Court, but were distinguished by it as cases dealing with entries by notaries and bank officials. The Court said,[20] "It is enough to say that the memoranda in question [here] are not within any of these classes, and, if admissible at all, this is by virtue of § 4622 of the Code. . . ." The Court then declared the entry to be inadmissible under the statute because not made in a professional capacity or in the course of professional conduct. The question was also passed upon in the case of *Sypher* v. *Savery.*[21] An entry, made by a treasurer of a hotel company in the regular course of his business as such, was offered in evidence. If he had been shown to be dead at that time, it seems from the facts of the case that this entry would have been admissible under the general rule. But the Court held,[22] that it was necessary to show both that he was then dead, and that the entries were against his interest.[23] The decision in-

[17] *Weber* v. *C. R. I. & P. Ry. Co.*, 175 Iowa 358.

[18] See *supra*, note 15.

[19] 153 Iowa 579.

[20] At page 585.

[21] 39 Iowa 258.

[22] At page 262.

[23] In the case of *Mahaska County* v. *Ingalls*, *supra*, at page 88, the Court recognized the existence of the general rule but concluded, "but see Rev.

dicates that the treasurer of the hotel company was not regarded as a "professional" man.

In the case of *Levi* v. *Levi*,[24] an account book was introduced against the estate of one deceased. Some of the entries were verified by the persons making them as required by the account book statute.[25] But one of the clerks died before the trial. His handwriting was proved and the Court, without hesitation, held the entry to be admissible. This case cannot be construed as recognising the general rule concerning regular entries, the entry was considered admissible under the account book statute. It seems that such entries are often admitted under the rule as to account books whereas in fact they fall within the general rule.[26] Though such an entry is admissible in Iowa only under the account book statute, the case at least illustrates that hearsay evidence, which comes within that covered by the general rule, has been declared to be competent evidence by our Supreme Court.

The Iowa decisions, directly in point with the general rule, however, have entirely repudiated that rule for the introduction of entries by persons, since deceased, made in the ordinary course of non-professional business. It is submitted that the Court might have entertained the same attitude toward regular entries that it entertained toward declarations against interest, by construing the statute as declaratory of the common law and not in derogation of it, and that, in choosing the course it did, the Court repudiated a rule of evidence which is well established in other American jurisdictions.

The statute as it now stands in the Code is very objectionable when considered in the light of generally established rules of evidence. In the first place, the statute combines and confuses two separate and distinct rules of evidence, namely, declarations against interest, and regular entries in the course of business conduct. In view of the decisions of the Supreme Court on the question of proof of oral declarations against interest by persons since deceased, a

---

§ 3998," which is the statute here considered. That reference would infer that the Court thought the statute excluded the general rule. Again, in *State* v. *Woodard*, 20 Iowa 541, at page 550, the Court stated that for an entry, by one deceased, to be admissible as evidence of the facts recorded, it was necessary that it be against the interest of the entrant, and cited Rev. § 3998.

[24] 156 Iowa 297, at 307.

[25] For discussion of this statute, see post, page 93 *et seq.*

[26] WIGMORE, § 1538.

statute hardly seems necessary on the question of introduction of entries, and other writings, against interest. But if a statute is desired, it is submitted that such a statute should be made a separate section in the Code.

In the second place, the statute requires that the entry be made in the course of professional conduct, and not merely in the ordinary course of business. This restriction seems entirely uncalled for. The general rule admits entries made by physicians and attorneys, but it also recognizes entries made by business men, their clerks and agents as well. There is no reason why a doctor's entry should be deemed trustworthy and a merchant's entry not.

In the third place, the statute emphasizes an entry made in performance of a duty specially enjoined by law. The general American rule contains no such requirement, and it seems clear that such a requirement is unnecessary.[27] Most English decisions have required an entry to be made in performance of a duty to some third person.[28] But American decisions have not required a duty to any one; it is sufficient that the entry be made in the regular course of business. Thus an entry by a jeweler who had kept his own books, and was then dead, was held admissible.[29] Similarly, in the case of a wheelwright,[30] and a teamster.[31]

It is submitted that § 4622 of the Code has caused the repudiation, in Iowa, of a well established rule of evidence, and that this statute should be repealed. The following suggestion is submitted, with deference, as a plausible substitution:

"The entries and other writings regularly made in the ordinary course of business, at or near the time of the transactions referred to, shall be admissible to prove the facts recorded, when it shall appear that the person who made the entries is deceased, insane, or permanently absent from the jurisdiction of the court."

It will be noted that this suggestion does not include a requirement that the entrant have personal knowledge of the transaction recorded. That omission was prompted by the reflection that, in our present day system of business, many bookkeepers and clerks record facts which are not the result of their personal knowledge. A salesman may make sales and report, orally or on a slip of paper, the facts concerning the sales to a bookkeeper. The bookkeeper

---

[27] WIGMORE, § 1524.
[28] WIGMORE, § 1524.
[29] *State* v. *Phair*, 48 Vt. 366.
[30] *Lassone* v. *Railroad*, *supra*.
[31] *Dicken* v. *Winter*, *supra*.

then makes the first permanent entry. If at the trial the salesman was unavailable, a requirement that the entrant have personal knowledge would exclude the entry of the bookkeeper. Or if the bookkeeper was unavailable the salesman would be the one that had the personal knowledge but he did not make the entry. Then suppose both were unavailable. It seems that the entry still ought to be admissible. The basis for allowing the introduction of regular entries is the fact that the regularity of business customs renders them reliable. Such an entry as the one supposed would be made in the course of a regular system of bookkeeping, and the entry would be made in the ordinary course of business. That seems a sufficient requirement.[32] It may be added that the Iowa account book statute, which is discussed below, provides for the admissibility of entries in a party's account books, that are verified by one having personal knowledge of the records; no requirement is made that he have personal knowledge of the transactions recorded. When the entrant's oath makes such entries, made in the regular course of business, competent evidence, it is the regularity of the records that renders them trustworthy; for he is not testifying to facts within his personal knowledge. It is submitted that when an entrant is dead, but witnesses are available to testify that he made the entry in the regular course of business, it necessarily follows that he had personal knowledge of the records, and it seems that under the general rule the necessity of the case, and the trustworthiness, afforded by the fact that the entries were made in the ordinary course of business, should make such an entry competent evidence.

Books of Account.

Books of account, kept by one of the parties to an action, were originally admissible in evidence as an exception to the Hearsay Rule. The party was disqualified as a witness because of his interest in the case. As many American shopkeepers had no clerks, the books which they themselves kept often were the only evidence of debts owed them in the course of business. If they could neither testify as witnesses nor introduce their books as evidence, in many cases they were without competent evidence of debts owed them. Because of the necessity of the case, it came to be the rule to let the books be introduced in evidence.[33] The regularity of the books

[32] Wigmore, § 1530.
[33] Wigmore, § 1537.

rendered them trustworthy.[34] But as the books were looked upon as self-made evidence for the party,[35] restrictions were placed upon their introduction. They had to have an honest appearance.[36] The party, though incompetent as a witness, had to make a suppletory oath, identifying the entries as made by himself and that the books were correctly kept.[37] It had to appear that he had personal knowledge of the transaction recorded.[38]

In Iowa, before the Revision of 1860, a party was disqualified as a witness because of interest.[39] So the necessity for a party's books of account being admissible in evidence as an exception to the Hearsay Rule existed at that time. The restrictions, placed upon the admissibility of such books, were embodied in a statute in the Code of 1851.[40] The statute, with two additions, still appears in the Code.[41] In the Revision of 1860, the disqualification of a party

---

[34]WIGMORE, § 1546.

[35]WIGMORE, § 1518.

[36]WIGMORE, § 1551.

[37]WIGMORE, § 1554.

[38]WIGMORE, § 1555.

[39]*Wise* v. *Patterson*, 3 G. Greene 471; *Forshee* v. *Abrams*, 2 Iowa 571; *Cherry* v. *McCorkle*, 8 Iowa 522; *Keys & Alford* v. *Holmes & Ristine*, 11 Iowa 139.

[40]§ 2406 of the Code of 1851, which appears as § 4623 of the Code of 1897, provided as follows:

"Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their creditability:

"1. They must show a continuous dealing with persons generally, or several items of charge at different times against the other party in the same book or set of books.

"2. It must be shown by the party's oath, or otherwise, that they are his books of original entries.

"3. It must be shown in like manner that the charges were made at or near the time of the transactions therein entered, unless satisfactory reasons appear for not making such proof.

"4. The charges must also be verified by the party or clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why such verification is not made."

[41]The Thirty-fifth General Assembly, Chapter 296, § 1, amended the Statute by adding the following paragraph:

"5. In all cases where depositions are taken by either method provided by law, outside the county in which the case is for trial where books of account are competent evidence in the case, the party desiring to offer the entries of said books as evidence may cause the same to be photographed by or under the direction of the officer taking the deposition and

as a witness because of interest was abolished.[42] This statute removed the necessity which originally caused the introduction of parties' books of account to be made as an exception to the Hearsay Rule. It is well recognized in Iowa that a witness may introduce memoranda to aid his recollection or memoranda of past recollection.[43] Therefore, the party may now testify and he should be allowed to introduce the books as such memoranda, or if his clerk made the entry he can testify and so introduce them.[44] Thus we see, that the real necessity for the introduction of the books as an exception to the Hearsay Rule has vanished, but the Court still pointed out that they were admitted because of necessity.[45] The statute has remained in force and the introduction of such books is still governed by it.

The statute says, "books of account containing charges by one party against the other." In construing this sentence it has been held that in a case where two plaintiffs sued one defendant and the books of one of the plaintiffs were offered in evidence, but it did not appear that the books were kept for the two plaintiffs jointly the books were excluded because they did not contain charges

such photographic copy when certified by such officer with his seal attached shall be attached to the deposition, and if the record shows affirmatively the preliminary proof required by subdivisions one, two, three and four of this section, such copy shall be admitted in evidence with the same force and effect as the original.

The Thirty-eighth General Assembly, Chapter 393, § 1, amended subdivision four of the statute by adding to it the following sentence:

"Any loose leaf or card or other form of entry which may be in use in the ordinary course of business by the party seeking to prove an account against another, and shall have been properly identified as being the original entry of such account shall be admitted as competent evidence for the purpose of proving such account by a deposition or in open court, and it shall be competent for any person whose duties in the ordinary course of such business require a personal knowledge of the records of such business, to verify such account or make deposition or testify in open court with regard to any matters pertaining to such records."

[42] § 3980, this appears as § 4603 of the Code of 1897.

[43] *State* v. *Brady*, 100 Iowa 191, at 201; *Gibson* v. *Seney*, 138 Iowa 383, at 388; *Graham* v. *Dillon*, 144 Iowa 82; *Porter* v. *Madrid State Bank*, 155 Iowa 617, at 624; *Furlong & Meloy* v. *Insurance Co.*, 136 Iowa 468, at 476; *State* v. *McGruder*, 125 Iowa 741, at 748; *Worex* v. *Railway Co.*, 175 Iowa 1, pages 6 to 9.

[44] *Graham v. Dillon*, 144 Iowa 82; *Porter* v. *Bank*, 155 Iowa 617, at 624; *Gibson* v. *Seney*, 138 Iowa 383, at 388; *State* v. *Brady*, 100 Iowa 191, at 201. See also WIGMORE, § 1560.

[45] *Karr* v. *Stivers*, 34 Iowa 123, at 126.

by *the plaintiffs* against the defendant.[46] The statute further says, "charges . . . .'. made in the ordinary course of business." In construing this phrase, it has been held that charges concerning cash items on the books do not usually come within the ordinary course of business.[47] But where the books are those of a bank, or one engaged in real estate, general brokerage, discount business, the business of lending money, etc., the character of the business may be such that cash items may properly be considered as charges made in the ordinary course of business.[48] Entries made as memoranda of contracts to sell hogs do not constitute charges made in the ordinary course of business.[49] An agent's loan register is not such an account book as to come within the statute.[50]

As to the first paragraph of the statute, it has been expressly held that there must be continuous dealings between persons generally or several items against the same party.[51] As to paragraph two, the requirement that the charges be original entries seems to have been construed to mean that they be the first permanent entries.[52] Where a ledger is not the book of first permanent entries, it is not admissible as an account book.[53] But where memoranda of sales, etc., are made on slips and the first permanent entries are made in the ledger, the ledger is admissible as an account book.[54] There seems to be few cases in which the Court has construed paragraph three. In *Anderson* v. *Ames & Co.*,[55] the Court laid down the rule that failure to make the entry at or about the time of the transaction might be satisfactorily explained.

---

[46] *Hansen & Hansen* v. *Kirtley*, 11 Iowa 565.

[47] *Veiths v. Hagge*, 8 Iowa 163; *Young* v. *Jones*, 8 Iowa 219; *Sloan* v. *Ault*, 8 Iowa 229; *Cummins* v. *Hull's Admr.*, 35 Iowa 253; *Shaffer* v. *McCrackin*, 90 Iowa 578.

[48] *Young* v. *Jones*, 8 Iowa 219; *Levi* v. *Levi*, 156 Iowa 297; *Bank* v. *Richardson*, 141 Iowa 738; *Urcutt v. Hanson, Ex'x.* 70 Iowa 604.

[49] *Hart* v. *Livingston*, 29 Iowa 217; *Whisler* v. *Drake*, 35 Iowa 103.

[50] *Security Co.* v. *Graybeal*, 85 Iowa 543; *U. S. Bank v. Burson*, 90 Iowa 191.

[51] *Porter* v. *Bank*, 155 Iowa 617, at 624; *Young* v. *Jones*, 8 Iowa 219.

[52] *Hancock & Co.* v. *Hintrager*, 60 Iowa 374, where memoranda of sales were made in a "town book" and later entered in a "sales book," the sales book and not the town book was held to be admissible as an account book, apparently because it was the book of the first permanent entries.

[53] *Fitzgerald* v. *McCarty*, 55 Iowa 702.

[54] *Duffy* v. *Hardy Auto Co.*, 180 Iowa 745; *Ricker* v. *Davis*, 160 Iowa 37.

[55] 6 Iowa 486. In that case certain stone was delivered on July 28th and the entry was not made until sometime in October, after the work was finished and the party first had knowledge of what charge he should make.

As to paragraph four, failure to have the entries verified by the clerk that made them has been recognized as excluding the books as evidence.[56] The failure to provide such verification was held to be excused when the clerk was dead and his handwriting was proved.[57] The addition to the paragraph which was made by the Thirty-eighth General Assembly,[58] making loose-leaf accounts admissible as account books, seems to have been declaratory of the common law, for accounts kept on slips that were not bound together had been held to be admissible under the account book statute.[59] The further provision, that any person, whose duties require a personal knowledge of the accounts, may verify the accounts, seems to be a departure from the general rule of account books. Generally, the entrant had to have personal knowledge of the transaction recorded.[60] This provision of our statute does away with that requirement.

Paragraph five, added by the Thirty-fifth General Assembly,[61] cured a rather embarrassing situation under the decisions of our Courts. It was well established that copies of account books could not be admitted in evidence, the books themselves had to be produced.[62] When the books were out of the state, it was held that a copy of the account books attached to the deposition of the person that made the entries was not admissible, the books themselves had to be in court.[63] It seems that when the books and the clerks are out of the state, the method provided by the statute is a very proper method of introducing valuable evidence which might otherwise be unavailable because of the great inconvenience of complying with the former rule.

Other items in the account were also stated not to have been made at or near the time of the transaction, but the excuse refered only to the entries concerning the stone. The entries as to the stone were held admissible, the others excluded.

[56]*Ford & Butterfield* v. *Railway Co.*, 54 Iowa 723, at 730; *Herriott v. Kersey*, 69 Iowa 111.

[57]*Levi v. Levi*, 156 Iowa 297, at 307.

[58]Chapter 393, § 1.

[59]*Graham* v. *Work*, 162 Iowa 383; *Emeny Auto Co.* v. *Neiderhauser*, 175 Iowa 219; See also, *State* v. *Brady*, 100 Iowa 191, at 201; *Gibson v. Seney*, 138 Iowa 383, at 388.

[60]WIGMORE, § 1555.

[61]Chapter 296, § 1.

[62]*Halstead* v. *Cuppy*, 67 Iowa 600; *Creswell* v. *Slack*, 68 Iowa 110; *Bldg. & Loan Assn.* v. *Fitch*, 142 Iowa 329.

[63]*Peck v. Parchen*, 52 Iowa 46; *Churchill* v. *Fulliam*, 8 Iowa 45.

It has been laid down that when books of account are admitted in evidence, parol evidence may not be admitted to show that the language of the books means something different from what it imports.[64] But that case concerned the introduction of books of account against the administrator of one deceased. It is well established that books of account may be introduced against the estate of one deceased, notwithstanding the fact that Code Section 4604 excludes testimony concerning personal transactions with one now deceased, in an action against his administrator.[65] If the testimony, offered to explain the entries made in the account books introduced against an estate, should take the form of testimony concerning personal transactions with the deceased, such testimony should be excluded. But in the ordinary case of books introduced by a party to the suit, a witness may testify concerning facts within his own knowledge which tend to explain the entries made in the books.[66] The books alone do not stand as the best evidence of the transactions they record; parol testimony concerning such transactions may be introduced in their stead.[67]

When books of account are introduced in an action in which the person keeping the books, or the person charged on them, is not a party to the action the statute does not apply; it refers only to books, "containing charges [made] by one *party* against the other." If the person making the entries is a witness, he may use the books as memoranda to aid his recollection, or introduce them as memoranda of past recollection.[68]

As the situation now stands, the statute which permitted books of account to be introduced as an exception to the Hearsay Rule, has remained in force and effect although the books should not now be considered as hearsay evidence when the person making the entries verifies them; as to him they may be considered memoranda

[64] *Cummins* v. *Hull's Admr.*, 35 Iowa 253.

[65] *Dysart* v. *Furrow*, 90 Iowa 59; *Cummins* v. *Hull's Admr.*, 35 Iowa 253. In § 1559, Professor Wigmore recognizes the fact that books of account are admitted to prove personal transactions against persons since deceased, and he questions the validity of such a rule. He treats the books of account as memoranda of the past recollection of the party that verifies them and points out that as such they stand as the testimony of the witness, and should not be admitted when his testimony should be excluded. But apparently the Courts do not accept that attitude, and admit the books to prove personal transactions with persons since deceased.

[66] *Bank v. Richardson*, 141 Iowa 738.

[67] *Christman* v. *Pearson*, 100 Iowa 634.

[68] *Gibson* v. *Seney*, 138 Iowa 383, at 388; *State* v. *Brady*, 100 Iowa 191, at 201.

of past recollection. The statute says that "books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence *only* under the following circumstances. . . . . ." It seems that this provision might be construed as prohibiting the use of a party's account books to refresh a witness's recollection or as memoranda of his past recollection, that the statutory requirements would have to be met or the books would not be admissible in evidence. Such a construction would seem unjustly harsh. The Court has definitely avoided it. Memoranda on a calendar and in a book, which were clearly inadmissible under the account books statute, were held to be properly admitted as memoranda to aid recollection.[69] Again, entries concerning cash items in a book of accounts, which might have been held inadmissible under the statute, were held to be admissible to aid the recollection of the witness, and the Court said in dicta that they should be admissible as memoranda of past recollection.[70]

Though the books might be admissible as memoranda of past recollection when verified by the entrant, under the statute the books are now admitted in some instances where they would be inadmissible as mere memoranda of recollection. The entry in an account book by a clerk since deceased was admitted under the present statute but it would have been inadmissible without the statute, for Iowa does not recognize the general rule permitting regular entries, made in the course of non-professional business by one since deceased, to be admitted as an exception to the Hearsay Rule. Again, the books are held to be something different from the mere testimony of the entrant, for they may be admitted against an administrator although the person making the entries could not testify concerning personal transactions with the deceased which he has recorded in the books. Also, the statute permits the books to be verified by one having general knowledge concerning the record although he may not have personal knowledge, past or present, concerning the transactions recorded; books so introduced are an exception to the Hearsay Rule, for such entries are not memoranda which aid the recollection of the witness nor are they memoranda of his past recollection. So we see that, though the original necessity for the statute has ceased to exist, still it is perhaps a good thing, for it makes certain valuable evidence admissible which would otherwise be excluded.

FREDERIC M. MILLER.

[69] *Porter* v. *Bank*, 155 Iowa 617, at 624.

[70] *Graham* v. *Dillon*, 144 Iowa 82, at 84.

Iowa Law Bulletin

Published four times a year by the faculty and students of the College of Law of the State University of Iowa. Issued January, March, May and November.

NOTES

WORKMEN'S COMPENSATION ACT DECISIONS.

In place of the large number of cases which formerly were decided on common law rules governing master and servant, we now have decisions on the various sections of the Workmen's Compensation statutes. The Supreme Court of Iowa has within the last few months handed down decisions of practical importance on questions arising under the statute in this State. Several of these decisions are commented upon in the following pages. The list does not purport to be exhaustive of the cases decided under the statute, but covers some of what have seemed the more important of the recent decisions. The comments are by the various members of the student editorial board of the Bulletin.

WHO IS AN EMPLOYEE UNDER THE STATUTE.

The claimant was employed as a driver by a teaming contractor who hired out teams and drivers to persons who desired such services. The contractor paid claimant for his services, and the claimant was responsible to the contractor for giving the team proper care and attention. The contractor, at defendant's request, sent complainant with a team to work for defendant. Defendant's foreman put the claimant to work, and gave him instructions as to the particular work he was to do. While engaged on this job, claimant received the injury for which compensation was sought. Held,

that he could not recover. Claimant was not under any contract of service for the defendant, hence he did not come within the Compensation Act. *Knudson et al.* v. *Jackson,* 183 N. W. 391.

This is a case of general and special employers, the contractor being the general employer and the defendant, the special employer. If a master lends his servant to another for a particular employment, the servant, for any thing done in that employment is the special servant of the one to whom he is lent and the general servant of the one who lent him.[1]

In the Code Supplement of 1913, § 2477 M 16, "employee" is defined as follows: "(b) 'Workman' is used synonymously with 'employee' and means any person who has entered into the employment of, or works under a contract of service, express or implied, or apprenticeship for an employer". The case in question seems to be the first one in which the Iowa Court has passed upon a similar state of facts under the Workman's Compensation Act. But the Court has previously said, in defining "employment" within the act, "The employment must be under contract of service".[2] This question, however, is not a new one as courts of other states having similar statutes have passed upon it.

According to the California statute, the term "employer" includes every person who has any person in his service under any contract of hire; the term "employee" includes every person thus in the service of such employer.[3] In *Employer's Liability Assurance Corporation* v. *Industrial Accident Commission*[4] it was said: "The definitions of 'employer' and 'employee' in our . . . law are broad enough to include both the general and the special employer." The general employer was held liable.[5] The New York statute defines an employee as, "A person who is engaged in a hazardous employment in the service of an employer".[6] In an action against the general employer, the court held him and said, "The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself . . .'"[7] In other New York cases the special employer has been held liable.[8] Although the California and New York Courts seem to be opposed to the Iowa Court on

[1] *Bassi* v. *Orth,* 109 N. Y. S. 88; *Morris* v. *Trudo,* 83 Vt. 44, 74 Atl. 387; *Alaimo* v. *E. & J. Marrin Co.,* 121 N. Y. S. 563; *Wilbur* v. *Frogione & Romano Co.,* 109 Me. 521, 85 Atl. 48; *Ash* v. *Century Lumber Co.,* 153 Iowa 523, 133 N. W. 888.

[2] *Pace* v. *Appanoose County,* 184 Iowa 498, 505.

[3] Workman's Compensation, Insurance and Safety Act, §§ 13 and 14.

[4] 177 Cal. 771, 171 Pac. 935.

[5] *Kirkpatrick* v. *Industrial Accident Commission,* 31 Cal. App. 668, 161 Pac. 274.

[6] Laws 1914, C. 41, § 4.

[7] *DeNoyer* v. *Cavanaugh,* 221 N. Y. 273, 116 N. E. 992.

[8] *Gimber* v. *Kane,* 155 N. Y. Supp. 1109; *Dale* v. *Hual Construction Co.,* 161 N. Y. Supp. 540.

this question, the difference between the definitions of "employee" in their statutes and ours is probably sufficient to account for these contrary holdings.

There are, moreover, decisions in other jurisdictions, under definitions more nearly like that of the Iowa statute, which sustain the Iowa rule. Thus the New Jersey Court, in applying the definition of "employee" as all natural persons who perform service for another for financial consideration,[9] held that the general employer was liable, and said that the special employer was not liable, for he had no contract of service with the employee.[10] And the Massachusetts Court, in applying the provision, "This act shall apply to all laborers . . . in the service of . . . a . . . city . . . under any . . . contract of hire",[11] held that the special employer was not liable.[12]

The Court, in the instant case says, "A person 'who has entered the employment of an employer' is 'a person who works under contract of service, express or implied, for an employer' ". This does not seem necessarily to be the result. It is well settled that the general master may "lend" his servant to another person for service in the business of the other, and that while he is engaged in the business of this other person, and in all respects subject to his direction and control, he becomes the servant of this second person.[13] Whether the employer is the servant of the one or the other in the doing of any particular act depends on which one has the right to control him in its performance.[14] Therefore, if the contractor, in hiring out the claimant, had meant to relinquish temporarily his control and management of his servant to defendant, claimant in the doing of the work in question, would have become the servant of the special employer, the defendant. Yet there would have been no "contract of service, express or implied" between them. A contract is an agreement, enforceable at law, made between two or more persons, by which rights are acquired by both to acts or forbearances on the part of the other.[15] Hence, a person "who has entered the employment of an employer" is not necessarily "a person who works under contract of service, express or implied, for an employer".[16]

---

[9]Chapter 95 § 3, par. 23, P. L. 1911.

[10]*Rongo* v. *Waddington & Sons*, 87 N. J. L. 395, 94 Atl. 408.

[11]St. 1913, c. 807, § 6.

[12]*Peach* v. *Bruno*, 224 Mass. 447, 113 N. E. 279. See also *In re Clancy*, 228 Mass. 316, 117 N. E. 347, *Pegeon's Case*, 216 Mass. 51, 102 N. E. 932.

[13]*Fisher* v. *Charles Levy Circulating Co.*, 182 Ill. App. 393; *Laugher* v. *Painter*, 5 B. & C. 547; *Philadelphia & R. Coal and Iron Co.* v. *Barrie*, 179 Fed. 50, 102 C. C. A. 618; *Wilbur* v. *Forgione & Romano Co.*, 109 Me. 521, 85 Atl. 48.

[14]*Ash* v. *Century Lumber Co.*, 153 Iowa 523, 133 N. W. 888.

[15]ANSON, CONTRACTS, 9.

[16]*Janik* v. *Ford Motor Co.*, 180 Mich. 557, 147 N. W. 510.

If entering the employment of an employer is not synonomous with working under a contract of service for him, it seems that our Supreme Court did not give enough weight to the first term of the definition of employee in arriving at the conclusion that "in order for a person to come within the terms of this act as an employee it is essential that there be a 'contract of service, express or implied' with the employer whom it is sought to charge with liability".

From the facts of this case, did complainant enter the employment of defendant? As the horse and wagon belonged to the general employer it is hardly probable that he intended entirely to surrender the control and management, for the time, to the special employer.[17] When carriages with horses and drivers are hired out, it is quite likely that the driver does not become the servant of the hirer but remains subject to the control of his general employer.[18] Hence, it is very probable that the complainant did not enter the employment of defendant but remained in that of the contractor.[19] If complainant was not a person who had entered the employment of defendant, and was not working under a contract of service for him, he was not an employee of defendant, within the statute. The result of this case, therefore, seems sound.

Although, from the facts, it is somewhat difficult to see how the Court could have arrived at a different result, it is nevertheless equally difficult to see how they excluded one of the terms of the statutory definition of "employee", which terms are joined by OR, and rested their decision solely upon the other term. It is difficult to see why the statute as it now reads must necessarily exclude the case of the "lent servant" who may be injured while "in the employment of" his special master. And it is also difficult to see why the term "in the employment of" should be used in the statute if it means nothing more than, or different from, the term "contract of service for".

CASUAL EMPLOYMENT—EMPLOYMENT FOR EMPLOYER'S TRADE OR BUSINESS.

A retired farmer who lived in a small town employed the plaintiff and three other carpenters to erect a corncrib on his farm which he had leased to a tenant. Each man was hired by the hour and arrangements were made to take them back and forth to the farm by automobile. Soon after commencing work, a fellow workman, while drawing a nail with a pinch bar, struck the plaintiff in the right eye destroying the sight. For this injury he claimed compensation. The remaining workmen completed the corn crib in

[17] *Shepard* v. *Jacobs*, 204 Mass. 110, 90 N. E. 392.

[18] *Laugher* v. *Painter*, 5 B. & C. 547; *Little* v. *Hacket*, 116 U. S. 366; *Ash* v. *Century Lumber Co.*, 153 Iowa 523, 133 N. W. 888.

[19] *Driscoll* v. *Towle*, 181 Mass. 416, 63 N. E. 922; *Huff* v. *Ford*, 126 Mass. 24; *Lewis* v. *Long Island R. Co.* 162 N. Y. 52, 56 N. E. 548; *Stewart* v. *California Improvement Co.*, 131 Cal. 125, 63 Pac. 177, 724.

about five or six days. Held, that the plaintiff could not recover. He was not a workman within the meaning of the Compensation Act, since his employment was of a "casual" nature and not for the purpose of the employer's trade or business. *Oliphant* v. *Hawkinson*, 183 N. W. 805.

The original section of the Compensation Act excepted from the definition of a workman all persons whose employment is purely casual and not for the purpose of the employer's trade or business.[1] This section was later amended by inserting the word "or" in the place of the word "and", thus excepting from the definition of workman: first, all persons whose employment is purely casual; and second, all persons whose employment is not for the purpose of the employer's trade or business.[2] The instant case, however, arose before the amendment; therefore the plaintiff cannot be excluded from the provisions of the Act, unless it appears that his employment was both casual and not for the purpose of the employer's trade or business.

Casual as used in the Workmen's Compensation Act means something which comes without regularity and is occasional or incidental. An employment is casual when it is not stable, regular, periodic, or certain in nature.[3] An employment may be casual either with reference to the workman's trade or profession, or with reference to the contract of employment. The English courts, in construing the words "whose employment is of a casual nature", have held that the nature of the service rather than the duration of the employment is the determining factor.[4] In accordance with this view, some American courts have held that the nature of the employment depended on the character of the service rather than the tenure of employment.[5] In most American jurisdictions, however, the contract of service is to be used as the test.[6]

Under this interpretation, a machinist by occupation has been held to be a casual employee when he is engaged to repair a farm tractor.[7] In the instant case, the Iowa Court preferred the latter view. This interpretation is especially appropriate in Iowa since the Act provides that the employer shall insure his liability under the Act. Certainly the purpose of this exception was to relieve the employer of this obligation of insurance in the case of workmen who are employed for short periods. The Iowa Court had accepted these reasons in a previous recent decision.[8]

---

[1] Code Supp. 1913, § 2477m 16b.

[2] 37 G. A. ch. 270, § 10.

[3] *Porter* v. *Mapleton Electric Light Co.*, 183 N. W. 803; *Bedard* v. *Sweinhart*, 186 Iowa 655, 172 N. W. 937; *In re Gaynor*, 217 Mass. 86, 104 N. E. 339.

[4] *Hill* v. *Begg*, [1908] 2 K. B. 802, 805.

[5] *Thompson* v. *Twiss*, 90 Conn. 444, 97 Atl. 328.

[6] *Western Union Telegraph Co.* v. *Hickman*, 248 Fed. 899; *In re Chesvers*, 219 Mass. 244, 106 N. E. 861.

[7] *Maryland Casualty Co.* v. *Pillsbury*, 172 Cal. 748, 158 Pac. 1031.

[8] *Herbig* v. *Walton Auto Co.*, 182 N. W. 204, 205.

Turning to the second question, it must be admitted at the outset that there is but little authority which aids definitely in determining the meaning of "trade and business" as used in the Workmen's Compensation Act. Business is defined by the Century Dictionary as that which busies or occupies one's time, attention, and labor as his chief concern. The meaning of legislatures as expressed in the statutes is not so extensive. Business, in a legislative sense, is confined to that which occupies the time, attention, and labor of men for purposes of livelihood or profit.[9] The retired farmer in the instant case would satisfy the definition in that he leases the farm for pecuniary profit. The rent is the profit issuing out of the land in retribution for the use.[10] The definition of trade is satisfied to the same extent. Trade is that craft or business which a person carries on as a means of livelihood.[11] Certainly it might well be decided that the retired farmer had a "trade or business" within the meaning of the Act since he leased the farm for purposes of profit.[12]

The next inquiry is whether the carpenter's employment was for the purpose of the retired farmer's trade or business. As owner of farm land, it would be part of his business to develop the land and this would necessarily include not only the maintenance of the premises in good repair but also the construction of improvements. The statutory test is whether the employment is for the purpose of the employer's trade or business. The proper interpretation of this would seem to be: Was the workman's employment in furtherance of the employer's trade or business? One Minnesota case held that the building of a temporary shed was not for the purpose of the defendant's trade or business because it was not a part of it.[13] According to the statute it would seem that it is not neces-

[9] *State* v. *Boston Club*, 45 La. Ann. 585, 12 So. 895; *Moore* v. *State*, 16 Ala. 411, 414.

[10] *Thorn* v. *De Breteuil*, 83 N. Y. Supp. 849, 856, 86 App. Div. 405.

[11] *In re Master Granite & Blue Stone Cutter's Ass'n*, 23 Pa. Co. Ct. R. 520.

[12] This contention may be urged very strongly because the Industrial Commissioner found that the only activity in which the retired farmer had been engaged was the care of the farm, and that the erection of the corncrib was in promotion of these interests. REPORT OF THE WORKMEN'S COMPENSATION SERVICE FOR YEAR ENDING JUNE 30, 1920, p. 120. It would have been a more difficult question if the retired farmer had been engaged in several lines of activity. Even, then, it would seem that the only logical test would be: Was the carpenter's employment in furtherance of that portion of the retired farmer's activity which related to the farm? This would seem true though the renting of the farm occupied only a minor portion of the retired farmer's time. One person may have more than one business, and the fact that he has several separate businesses should not release him from the prescribed liability in each separate business.

[13] *State* v. *District Court*, 138 Minn. 103, 164 N. W. 366.

sary that the employment be a part of the employer's trade or business in order to be for the purpose of it. Thus, it might at least be reasonably contended that the carpenter's employment was in furtherance of the defendant's trade or business and as a consequence it would be for the purpose of it.

If the carpenter was employed for the purpose of the retired farmer's trade or business, the further question arises whether he was engaged in such an "agricultural pursuit" as would exempt the farmer from all liability as provided by the Act.[14] In the first place it must be noted that the exemption exists only when the employees are engaged in agricultural pursuits. It is entirely possible that the carpenter, although engaged in furtherance of the retired farmer's business, is not engaged in agricultural pursuits, therefore the latter's liability would be precisely the same as any other employer. One California court has pointed out that an employee on a farm is not engaged in agricultural pursuits unless the duties he performs pertain to agriculture in fact.[15] There seems to be no direct authority on this proposition but according to the case just cited, it appears that a carpenter who devotes his time to that calling cannot be considered as engaged in agricultural pursuits when he assists in the erection of a building on a farm.

The majority of the Iowa Court say very definitely that by the term "trade or business", the legislature did not intend to include every "industrial employment for pecuniary gain". The term "trade or business" is interpreted so as to include only those well defined and classified trades and businesses that are universally recognized. If this is the proper interpretation of the words, then it is very doubtful whether farming is a trade or business. Under acts controlling apprenticeship, farming has not been classified as such a trade or business that a pauper could be bound to it as an apprentice.[16] The activity of a retired farmer is still more difficult to classify; therefore if by the words "trade or business", the legislature intended only those well defined classes, then the Court was surely right in saying that a "retired farmer" has no trade or business within the meaning of the Act.[17] When the employer has no trade or business, it is clear that the workman cannot recover.[18] It is submitted, however, that the Court has adopted an unnecessarily strict interpretation of the words "trade or business". Did the legislature intend to limit the scope of these words to the narrow classification of trades?[19]

---

[14]Code Supp. 1913, § 2477m.

[15]*Shafter* v. *Commission*, 175 Cal. 522, 166 Pac. 24.

[16]*Leeds* v. *Inhabitants of Freeport*, 10 Me. 356.

[17]At the present time, a petition for a rehearing of this case is pending. If it is overruled, this decision will definitely settle the Iowa law in regard to what is a farmer's "trade or business." [This petition has been overruled.—Editor.]

[18]*Marsh* v. *Groner*, 258 Pa. St. 473, 102 Atl. 127.

[19]By Code Supp. 1913, Sec. 2477m, it is provided that "this act shall not apply to any household or domestic servant, farm or other laborer

SUBROGATION TO EMPLOYEE'S CLAIM AGAINST WRONGDOER.

One Bodine, an employee of the defendant, was injured in a collision between an interurban car and one of defendant's wagons which he was driving. Defendant commenced payments as provided for in the Workman's Compensation Act; but ceased when Bodine settled with the interurban company, and covenanted not to sue it; claiming that it had lost its right of subrogation to Bodine's rights against the interurban company. Bodine having died, the court held upon suit by his administrator, that since the defendant had not proved legal liability on the part of the interurban company, nor that the money paid was in settlement of any liability, it was not shown that defendant suffered any loss due to the covenant, and so must continue the payments. *Renner* v. *Model Laundry, etc. Co.*, 184 N. W. 611 (Iowa Sup. Ct.).

This case arose under Code Supp. § 2477m6(b), providing that where an employee receives injury for which compensation is payable under the Workman's Compensation Act, under circumstances creating a legal liability in a person other than the employer, and the employer pays the compensation, he is entitled to indemnity from the person so liable and may be subrogated to the rights of the employee.

The decision here rests on the basis that no legal liability on the part of the interurban company was shown, and consequently no showing of a right of subrogation which might have been lost. However the Court says on page 615, ". . . it is to be said that if appellants had any right of subrogation under the terms of the statute (a situation not yet made to appear) it was not within the power of Bodine to deprive them of it, by any agreement between him and a 'person other than his employer.'" This dictum follows the Nebraska rule as expressed in *Hugh Murphy Const. Co.* v. *Serck*,[1] where the employee was injured in a collision between a street car and the wagon which he was driving. The employee, after receiving some payments, released the street car company, whom the trial court found was negligent, and the employer stopped payments. It was held that the payments must continue, that the employer had not lost his right of subrogation since he could not be deprived of his rights by an act of the employee and a third

---

engaged in agricultural pursuits, *nor persons whose employment is of a casual nature*." (Italics those of the writer.) It seems that under this exception, the court could have reached the same conclusion that they did without the necessity of interpreting the words "trade or business." Here it is stipulated that the Act should not apply to casual employees and no reference is made to "trade or business." This exception was in conflict with the exception discussed in the case which was limited to casual employees not employed for the purposes of the employer's trade or business. Since the amendment of the statute, these exceptions have been harmonized.

[1]104 Neb. 398, 177 N. W. 747.

person. The Court said:[2] "The wrongdoer must take notice of the rights of all, and cannot by a settlement with the injured party increase the burden of the innocent employer. The parties are equal in the eyes of the law and the courts will not suffer one to profit at the expense of the others."

The Iowa Court has decided that where the employee sues the tort feasor after receiving compensation, that any right of subrogation which the employer may have had is lost through failure to intervene.[3] This point does not seem to have arisen in Nebraska, but it seems that the tort feasor might plead the subrogation in abatement if he chose to do so on the Illinois idea that the statutory subrogation amounts to an assignment; but at any rate such a situation can easily be distinguished from the principal case. The Nebraska statute is not materially different from that of Iowa and the Iowa Court cites Nebraska authorities.[4]

This rule is similar to that in fire insurance cases, where the insurer can recover in the name of the insured without his consent from a tort feasor who is liable for the loss when the latter pays the insured, knowing that the insured has received payment from the insurer. In such a case a release by the insured is no defense.[5]

Many states have a statutory rule that the employee must elect, as in Michigan. New York requires a written assignment before the compensation becomes payable, but on receipt of compensation the employee is estopped from denying that he made such an assignment. The best solution without statutory change would seem the adoption of the Nebraska rule which requires the joining of all three parties in both suit and settlement.

Rules of Evidence and Compensation Act Procedure.

In a proceeding under the Workman's Compensation Act to recover compensation for the death of a factory foreman who was killed by the collapse of the factory building during a windstorm, oral hearsay evidence admitted without objection and an affidavit of a fellow workman, who at the time of the trial was in the army, proved that the deceased servant was, at the time of the accident, attempting to close the windows, which was a part of his duties. The Supreme Court held that the evidence should have been considered and given weight as evidence in connection with the other circumstances, and that the arbitration committee and the commis-

---

[2] 104 Neb. on 401.

[3] *Southern Surety Co.* v. *C., St. P., M. & O. R. R.*, 187 Iowa 357, 174 N. W. 329, 5 Iowa Law Bulletin 122.

[4] *Fidelity & Casualty Co.* v. *Cedar Valley Electric Co.*, 187 Iowa 1014, 1021; 174 N. W. 709, 711.

[5] *Ins. Co.* v. *Hutchinson*, 21 N. J. Eq. 107, 117; *Hart* v. *R. R.*, 13 Metc. 99, 46 Am. Dec. 719; *Tyler* v. *Ins. Co.*, 16 *Wend.* 385, 397; *Gracie* v. *Ins. Co.*, 8 Johns 237; *Timon* v. *Leland*, 6 Hill 237.

sioner erred in not considering it. *Reid* v. *Automatic Electric Washer Co.*, 179 N. W. 323 (Iowa Sup. Ct.).

Whether the oral hearsay evidence and the affidavit may properly be considered as proof depends on the construction of the statute by which the legislature has provided that "neither the commissioner nor the arbitration committee shall be bound by the common law or the statutory rules of evidence, or by the technical or formal rules of procedure." The only procedural requirement of this statute is that "such hearing . . . and investigations" are to be conducted "in the manner best suited to ascertain the substantial rights of the parties."[1]

The common law rule is that hearsay evidence is not admissible to prove or disprove a fact.[2] Since the Iowa statute provides for dispensing with the "common law rules of evidence", the immediate question is whether the hearsay rule is necessary "to ascertain the substantial rights of the parties." Under an identical statutory provision, the New York courts have held that hearsay evidence may be admitted and considered but that an award cannot be sustained unless supported by other evidence which would be sufficient if judged by common law rules.[3] The Illinois courts likewise hold that hearsay evidence alone will not support an award.[4] The California courts hold that the rule excluding hearsay is not a "technical" rule of evidence within the meaning of the California statute and therefore the commissioner is not authorized to consider hearsay evidence at all.[5] It seems that in spite of the statutes which provide that the commissioner shall not be restricted by the rules of evidence, the tendency of the courts is to test the admissibility and weight of the evidence by common law standards.[6] The Michigan courts contend that the hearsay rule is more than a mere technicality of the law and that therefore it must be retained as a safeguard in what are essentially judicial investigations.[7]

The purpose of the hearsay rule is to reject assertions, offered testimonially, which have not been in some way subjected to the

---

[1] 37 G. A. Chap. 270, § 15.

[2] 10 R. C. L., p. 958.

[3] *Carroll* v. *Knickerbocker Ice Co.*, 218 N. Y. 435, 113 N. E. 507.

[4] *Victor Chemical Works* v. *Industrial Board*, 274 Ill. 11, 113 N. E. 173.

[5] *Englebretson* v. *Industrial Commission*, 170 Cal. 793, 151 Pac. 421. This case is easily distinguished from the instant Iowa case upon the wording of the statutes, but they are so opposed in spirit and reasoning that a more fundamental difference is apparent. By the California Laws, 1913 Ch. 176, § 77, it is provided that the commission shall not "be bound by the technical rules of evidence." Though it is a conceivable conclusion that the hearsay rule is not a "technical rule of evidence," it is clearly a "common law rule" within the meaning of the Iowa statute.

[6] 28 R. C. L., p. 827.

[7] *Reck* v. *Whittleberger*, 181 Mich. 463, 148 N. W. 247.

test of cross-examination in order to eliminate the many possible deficiencies, suppressions, and sources of error and untrustworthiness.[8] The rule developed as the jury became more dependent on the evidence, and adapted itself to the elimination of such untested and unreliable matters as might mislead the jury.[9] It became an adjunct to the jury system as a result of the process of separation of the functions of the jury and of the witness. On the continent of Europe, the hearsay rule is unknown. Perhaps three-fourths of the people of the world get along without it. The ecclesiastical courts and the admiralty courts never adhered to the rule.[10] It is inconceivable that a rule which is disregarded by so many courts is such a fundamental and elemental principle of a judicial trial that it must be retained in order "to ascertain the substantial rights of the parties".

The Iowa Court has previously pointed out that the entire Act is intended to be highly remedial and must be construed so as to eliminate technicalities which would defeat its object and purpose.[11] It is clear that it was the intention of the legislature to abolish the rules of evidence in order to assure the injured workman of prompt and substantial justice. The instant case is a good example of the injustice that would result if the court had adhered strictly to the rules of evidence. The only witness of the accident was in the army at the time of the trial and it would have been impossible to subpoena him or to get his deposition because it was not known exactly where he was stationed. He might have been on his way to France. The plaintiff was entitled to this evidence, but in order to secure it the trial would necessarily have had to been postponed until the witness was out of the army. By accepting the affidavit of this person, the court allowed the plaintiff an immediate trial with the advantage of the evidence of the absent witness. The necessity of depositions which are very expensive and difficult to obtain was also eliminated. Certainly this did not violate the procedural requirement that the hearings should be conducted "in the manner best suited to ascertain the substantial rights of the parties."

When the facts are to be determined by trained and discriminative men, such as is provided by the statute, the necessity for such rules of evidence as the hearsay rule seems to be obviated. The men who compose these tribunals are selected because of their education and experience which enables them to pass upon questions with an open and unprejudiced mind. Jurymen, on the other hand, are chosen without regard to their ability. Naturally, they lack the experience of the professional trier of fact. Since the rigid and technical rules of common law procedure were inspired by the lack of confidence in the jury, there seems to be no substan-

[8] WIGMORE ON EVIDENCE, Vol. II, Sec. 1362.

[9] WIGMORE ON EVIDENCE, Vol. II, Sec. 1364.

[10] *Wright* v. *Doe dem. Tatham*, 7 Adolphus & Ellis 375.

[11] *Rish* v. *Cement Co.*, 186 Iowa, 443, 170 N. W. 532.

tial reason why they should not be dispensed with as provided by the statute in proceedings under the Workmen's Compensation Act. The hearsay evidence should be admitted and taken for what it is worth, and if found sufficient to sustain a finding of fact favorable to the injured workman, then the award could very properly be based upon it alone. The courts have been too willing to suppress these newly created tribunals, and for this reason they have, consciously or unconsciously, resorted to a narrow interpretation of the procedural requirement of the statute which has practically destroyed its effect.[12] It is submitted that the Iowa Court has taken the better view.[13]

CAN A MURDERER BE PREVENTED FROM ACQUIRING PROPERTY THROUGH HIS CRIME?—A difficult but interesting question is presented when a person seeks to acquire or hasten his enjoyment of property through homicidal means. The situation usually arises where a prospective heir, devisee or legatee, or an insurance beneficiary, murders his ancestor, his testator, or his assured, as the case may be, or where one spouse murders the other. A more complicated variation of this situation came up in the recent case of *In re Emerson's Estate*.[1] The facts of that case were these. A testator gave the rents, issues, and profits of his property to his wife and son equally so long as the wife should live, and provided that if she predeceased the son, the property should go to the son absolutely; if the son predeceased the wife, he leaving no issue, then the property should go to the wife. The son was convicted of the murder of his mother and, pending his appeal in the Supreme Court, he committed suicide, leaving his widow, Ruth Emerson, surviving him. In a contest between this widow and the collateral heirs of the testator, it was held that the killing of the mother by the son was not within Code Supp. 1913, Sec. 3386, which provides that no person who feloniously takes the life of another shall inherit from such person or take anything from him by devise or legacy.

To say that a murderer shall be allowed to profit by his crime

[12]In this connection, it will be noted that it has been the practice of the common law courts to oppose the development of new tribunals which might compete with them. Perhaps the best illustration of this is the historical contest between Lord Coke and Lord Ellesmore, in which the former attempted to suppress the growing Equity Court. WILSON'S, LIFE OF JAMES I, pp. 94, 95. The contest between Lord Coke and the Admiralty courts is another example of the law courts' efforts to maintain their supremacy. Perhaps, the present attitude of the law courts towards the administrative tribunals provided by the Compensation Acts is inspired by similar motives. BENEDICT ON ADMIRALTY COURTS, 6; 55 Amer. Law Rev. 685.

[13]See "A Legislative Indictment of the Courts," by J. B. Winslow, 29 Harv. L. Rev. 395.

[1]183 N. W. 327 (Iowa Sup. Ct.).

is adhorrent to the average person's sense of justice, be he layman or lawyer. The civil law does not permit one to take property by inheritance or will from an ancestor or benefactor whom he has murdered.[2] And in the common law there is a maxim that no one shall be permitted to profit by his iniquity. The maxim is stated and applied in a Tennessee case, *Box* v. *Lanier*.[3] There a husband who had murdered his wife was precluded from taking her personalty. The Court said, "Where a husband murders a wife or an heir his ancestor, the common law rules of survivorship and succession will not operate in favor of the felon."

But common law forfeitures for felony do not exist under our laws. Furthermore, our legislatures have placed statutes of wills and statutes of descent and distribution upon our statute-books. Admitting, then, without question, that it is bad to allow the murderer to profit by his crime, yet the problem of the courts is, what legal principles consistent with our system of jurisprudence shall they invoke to prevent that result? To meet this problem, three views suggest themselves.

The first view is that where the legislature has provided clear and unambiguous rules for the descent and distribution of intestate property, and for the making and revocation of wills, there is no room for construction and interpretation to prevent the murdered from taking thereunder. This view seems to be supported by the weight of authority.[4] If it is to prevail, a statutory exception is necessary to prevent a murderer from acquiring property as a result of his crime. Such a statute exists in Iowa.[5] In *Schmidt* v. *Northern Life Association*,[6] where the beneficiary of an insurance policy murdered the assured, the Court decided a forfeiture on grounds of public policy. It is peculiar that no reference is made to the Iowa statute,[7] but the result is in line with authority in the

---

[2] 1 DOM. CIV. LAW (Strahan's ed.), Art 2551; Code Napoleon, 727.

[3] 112 Tenn. 393, 79 S. W. 1042.

[4] *Owens* v. *Owens* (1888), 100 N. C. 240, 6 S. E. 794; *Deem* v. *Milliken* (1892), 6 Ohio C. C. 357, affirmed without opinion (1895), 53 Ohio St. 668; 44 N. E. 1134; *Shellenberger* v. *Ransom* (1894), 41 Neb. 631, 59 N. W. 935, reversing s. c. (1891), 31 Neb. 61, 47 N. W. 700; *Carpenter's Estate* (1895), 170 Pa. 203, 32 Atl. Rep. 637; *In re Mertes' Estate*, 181 Ind. 478, 104 N. E. 753; *Bruns v. Cope*, 182 Ind. 289, 105 N. E. 471; *Kuhn* v. *Kuhn* (1904), 125 Iowa 449, 101 N. W. 152; *Gollnick* v. *Mengel* (1910), 112 Minn. 349, 128 N. W. 292; *McAllister* v. *Fair* (1906), 72 Kan 533, 84 Pac. 112; *Holloway* v. *McCormick* (1913), 41 Okla. 1, 136 Pac. 1111; *Hill* v. *Noland* (Tex. Civ. App. 1912), 149 S. W. 288; *Wall* v. *Pfanschmidt* (1914), 265 Ill. 180, 106 N. E. 785.

[5] Code 1897, § 3386.

[6] 112 Iowa 41; 83 N. W. 800. (1900).

[7] Sec. 3386, *supra*.

absence of such statute.[8] "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building which he had willfully fired."[9] The reader will at once note the distinction in the case of insurance. In such a case, the court, not feeling restrained by statutes of descent and distribution and of wills, is free to decide on the ground of public policy. The test of section 3386 came in *Kuhn v. Kuhn.*[10] The court there refused to extend the operation of the section to the distributive share of a widow who had murdered her husband. The section was pronounced to be in nature penal and as such to be strictly construed. Later, the section was enlarged to include "any interest in the estate of the decedent as surviving spouse."[11] Since our Iowa court is committed to this view, that is, that the language of the statute where plain and unambiguous shall prevail, the remedy is with the legislature. It is submitted that the scope and effect of Sec. 3386 should be so enlarged as to prevent a murderer in any case from acquiring property by his crime.

The second view is "rational interpretation" of the statutes. By this view, such statutes are read in the light of public policy. The spirit rather than the letter of the statutes is thereby adopted so that they may be read with a condition in them. "What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws" is the language used in the leading case of *Riggs* v. *Palmer.*[12] This view was adopted by the Supreme Court of Missouri in *Perry* v. *Strawbridge*[13], and by the Ontario Court in *McKinnon* v. *Lundy.*[14] Arguments in support of this view are cogently presented in several law periodical notes.[15] It cannot be denied but that this view would effectively cut off the murderer.

Is there not some way in which the murderer can be precluded that lies between these extremes? The late Dean Ames urged the application of the doctrine of a trust *ex maleficio* to this class of

---

[8]*Insurance Co.* v. *Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877, 29 L. ed. 997; *Association Co.* v. *Palmer*, 25 Beav. 605; *Schreiner* v. *High Court*, 35 Ill. App. 576.

[9]*Ins. Co.* v. *Armstrong, supra.*

[10]*Supra*, note 4.

[11]29 G. A. Ch. 135, Sec. 1.

[12]115 N. Y. 506 (1889), 5 L. R. A. 340, 22 N. E. 188.

[13]209 Mo. 621.

[14]24 Ont. R. 132; 21 Ont. App. 560; 24 Can. S. C. R. 650.

[15]80 Cent. L. J. 363; 83 Cent. L. J. 386.

cases.[16] In general, this doctrine (trust *ex maleficio*), is invoked whenever the legal title to property is acquired in such a manner as to render unconscientious the retention and enjoyment of the beneficial interest by the holder of the legal title. Equity, therefore, constructs a trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same.[17] Dean Ames, in the article above referred to, reviewed a number of cases that applied the doctrine to situations in which fraud was practised upon the testator or ancestor. At the conclusion of the review, he tersely presents the issue in these words: "The learned reader will at once appreciate the closeness of the analogy between these cases of fraud upon a testator or ancestor, and the cases where the testator or ancestor was killed. If the heir or devisee who gains the legal title by fraud must hold it as a constructive trustee, *a fortiori* should the same be true of one who acquires the legal title by a revolting crime." (p. 316.)

It may be regretted that this salutary doctrine, worked out by courts of equity and applied in analagous situations, is not pressed into service to prevent a murderer from retaining property acquired by his crime. But courts which have had this particular problem to deal with have, almost without exception, failed to make use of the equitable solution. Whether the failure is due to the fact that the doctrine has not been called to their attention through a mistake in the relief sought by parties-litigant, or whether the courts have purposely ignored the doctrine, is not always apparent. The New York Court,[18] however, saw and recognized the equitable doctrine in this very kind of case. "The relief which may be obtained against her (the murderess and devisee) is equitable and injunctive. The court, in a proper action, will, by forbidding the enforcement of a civil right, prevent her from enjoying the fruits of her iniquity." An Iowa case, *McDowell* v. *McDowell*,[19] although it does not deal with the murder of an ancestor or a testator, is, nevertheless, pertinent to show a recognition of equity and the doctrine of constructive trusts. The case was this. A mother had expressed her assent to the deathbed desire of her son that his wife should get all of his property on his decease. Four hours later he died without having done anything further than to express his desire verbally. When the mother later asserted her statutory claim to one half of the estate, the wife brought an action to quiet title. The Court, in deciding for the wife, said, "Whether we decide on the grounds of constructive trust or upon estoppel is immaterial." Proceeding upon the premise that the mother had, at least, shown bad faith, the Court seemingly flew in the teeth of the statutes of descent and distribution in order to reach an equitable result. The doctrine of constructive trusts is

[16] LECTURES ON LEGAL HISTORY, p. 310.

[17] POMEROY'S EQUITY JURISPRUDENCE (4th ed.), Vol. 3, § 1053.

[18] *Ellerson* v. *Westcott* (1895), 148 N. Y. 149; 42 N. E. 540.

[19] 141 Iowa 286 (1909).

well established and the cases cited above show it has been recognized in cases involving statutes of wills and statutes of distribution. The fact that the doctrine has practically been disregarded in the solution of property rights arising through murder cannot be conclusive as to the soundness or unsoundness of its application in such cases.

To sum up, the disposition of property rights arising through murder presents a difficult, triple aspect problem for the courts to solve. The view as to "rational interpretation," which holds that the statutes of descent and distribution were not intended to operate in favor of the murderer, has met with very little recognition from courts in general. Even Dean Ames who agrees with the result reached thereby criticizes the method of reaching that result. The constructive trust view, which recognizes the operation of the statutes in favor of the murderer but says the wrongdoer must hold the property thus acquired for those equitably entitled to it, this view, notwithstanding the learned and vigorous arguments of Dean Ames in its behalf, has not been followed by the courts to any extent. Nevertheless, this view does provide an ever-present remedy for a hard case not covered by statute. It would seem, however, upon any consideration of the problem, that a statute to prevent the murderer from taking the property would be at once the most effective and the most desirable solution. Such a statute would free the court from any suspicion of trying to usurp legislative functions. Moreover, it would make for certainty and directness. It would remove the necessity for an equity action in order to construct a trust in each individual case. Viewing the problem, then, from its several aspects, we submit that our legislature should broaden section 3386 at the earliest opportunity to the end that a murderer shall in no case be allowed to profit by his crime.

RECENT CASES

BILLS AND NOTES—INDORSEMENT—WORDS OF ASSIGNMENT AND GUARANTY AS INDORSEMENT.—The defendant made and delivered to the payee two promissory notes. These were purchased from the payee by the plaintiff in good faith and for value. The following was placed on the back of the notes by the payee at the time of transfer: "For value received I do hereby assign the within note to J and guarantee the payment of same when due or at any other time thereafter and consent to any extension of time or renewal waiving demand, notice and protest." This was signed by the payee. The defense was that the above constituted only an assignment and did not cut off the equities existing between the original parties. Held, that this writing amounted to a general indorsement. *Jones County Trust & Savings Bank* v. *Kurt,* 182 N. W. 409 (Iowa Sup. Ct.).

"The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser

without additional words is a sufficient indorsement." Code Supp. 3060a 31. A general indorser warrants that the instrument is a genuine valid subsisting contract; that he has good title to it; and that in the event of non-payment, he will upon proper notification pay the amount thereof to the holder. Code Supp. 3060a 65, 66. The effect of adding words purporting to be an assignment to the signature of the transferor has not received a uniform interpretation. The majority of cases hold that it does not alter the situation and that the transferor is bound in the capacity of an indorser. *Sears v. Lantz,* 47 Iowa 658; *Henderson v. Ackelmire,* 59 Ind. 540; *Lenhart v. Ramey,* 3 Ohio C. C. 135; *Markey v. Corey,* 108 Mich. 184. The cases holding the other view, that it is just what in terms it purports to be, *i. e.* an assignment, base their reasoning on the ground that the addition of words expressing the intent merely to assign, thereby excludes all other possible implications arising from the signature. This from the rule "*expressio unis.*" *Hailey* v. *Falconer,* 32 Ala. 536; *Ellsworth* v. *Varney,* 83 Ill. App. 94. When taken further this situation is treated as a qualified indorsement constituting the transferor a mere assignor of the title and the transferee an indorsee against everybody but the transferor. *Evans* v. *Freeman,* 142 N. C. 61. The guaranty alone written on the back of the instrument is considered by the majority of courts to constitute the transferor a general indorser so nothing is added in legal effect when the guaranty is coupled with an indorsement, *Hendrix* v. *Bouchard,* 138 Ga. 473. A waiver of notice serves simply to extend the liability so as to cause it to arise independently of notice. *Buck* v. *Davenport State Bank,* 29 Neb. 407. Such an indorsement on an instrument when taken by the indorsee in good faith, for value, and without notice, will vest the title in the indorsee free from equities. *Farnsworth* v. *Burdick,* 94 Kan. 749; *Leahy v. Haworth,* 141 Fed. 850. The instant case is not only representative of Iowa law but of the weight of authority in general.

DIVORCE—ALIMONY—SUIT FOR ALIMONY AFTER FOREIGN DIVORCE.—Plaintiff obtained a decree of divorce in Arkansas which allowed no alimony, but which did contain a recital that defendant should contribute to the plaintiff's support. The defendant was served by publication only. Plaintiff brought this action for independent alimony in Iowa and obtained jurisdiction by personal service. Held, that the severance of the marriage relation by absolute decree without alimony terminated the right to alimony and that the Arkansas court had no jurisdiction to find the facts upon which alimony might be awarded. *McCoy* v. *McCoy,* 183 N. W. 377 (Iowa Sup. Ct.).

There are two grounds upon which it may be urged that a decree of divorce rendered in one state, if sufficient to dissolve the marital relation, will also bar an independent suit for alimony in another state: (1) that the right to alimony is *res judicata* by the foreign decree; (2) that the dissolution of the marriage relation destroys

the very foundation of an independent action for alimony. The plaintiff argued upon the first of these grounds, which is supported by authority from other states. *Woods* v. *Waddle,* 44 Ohio St. 449, 8 N. E. 297; *Adams v. Abbott,* 21 Wash. 29, 56 Pac. 931. See note 34 L. R. A. (N. S.) 1106. While the Iowa court has no scruples against the action for independent alimony as such, *Graves* v. *Graves,* 36 Iowa 310, 14 Am. Rep. 525, its theory is that the relation of husband and wife must exist to justify a judgment for an allowance of this character to the wife. *Spain* v. *Spain,* 177 Iowa 249 on 254, 158 N. W. 529, L. R. A. 1917D 319; see note 6 A. L. R. 6. Since this is the theory of the Iowa court, any consideration as to *res judicata* is immaterial in so far as alimony is concerned, since the severance of the marriage relation removed all grounds for alimony subsequently in Iowa.

Plaintiff also contended that the recital in the decree that defendant was able to and should contribute to her support should make a case. Now a personal decree for alimony in favor of the plaintiff would have been void, not only in Iowa but in Arkansas as well. *Johnson* v. *Matthews,* 124 Iowa 255, 99 N. W. 1064. *Cf. Twing* v. *O'Meara,* 59 Iowa 326, 13 N. W. 321. See also note 9 L. R. A. (N. S.) 593. Had there been no decree, but only a statement of the amount of alimony that the defendant should pay, that statement would be of no effect. *Ex parte McMullin,* 19 Cal. App. 481, 126 Pac. 368. If an actual judgment for alimony or a decree as to the specific amount is void, there should be no more strength in a finding that it should be paid.

Although the result is hard in certain cases, it seems a logical development of the rule as worked out in this State.

DIVORCE—POWER OF COURT TO AWARD CUSTODY OF CHILDREN UPON REFUSAL OF DIVORCE—The plaintiff filed a petition for divorce alleging desertion and cruel and inhuman treatment. The prayer was in the usual form for a divorce, for the custody of two minor children, and for alimony. The answer was a general denial with a prayer that plaintiff's petition be dismissed. The trial court denied the plaintiff's application for divorce but awarded her the custody of the children. Held, that the order awarding the custody of the children to the plaintiff was invalid, as that issue was raised only incidentally on the pleadings and was not directly litigated on the trial. *Porter v. Porter,* 181 N. W. 393. (Iowa Sup. Ct.).

Section 3180 of the Code of 1897 provides: "When a divorce is decreed, the court may make such order in relation to the children * * * * * as shall be right." This case raises the question as to the power of the court to make such an order when the divorce is refused. There is a decided conflict on this issue, Iowa being cited among those jurisdictions which hold that the court has no power to make custodial orders when the divorce is denied. 19 CORPUS JURIS 342. The issue has been presented in two previous

Iowa decisions, *Garrett* v. *Garrett,* 114 Iowa 439, 87 N. W. 282, and *Mollring* v. *Mollring,* 184 Iowa 464, 167 N. W. 524. In the first of these cases, the custody of a minor son was awarded to the plaintiff upon pleadings and issues similar to those of the instant case, although her petition for divorce was refused. The Supreme Court reversed this decree, not because the lower court had no power, but because "nothing in the record indicates that his welfare could be better administered to by leaving him with plaintiff." In the *Mollring* case the custody of the children was made an issue by the defendant's cross-petition and evidence was offered upon the question of custody by both parties. A decree awarding the custody of a minor child to the defendant was affirmed by the Supreme Court, although the divorce was refused. That case is distinguished by the Court from the instant case in that here no evidence "could fairly be said to bear on the issue of the custody of the children, except as the testimony offered to establish cruel and inhuman treatment might be said to bear incidentally on this question." The analysis of these three cases shows that the Iowa Court does not consider itself divested of power to make orders concerning the custody of children, when a divorce is refused.

This holding is justifiable since the district court is not alone a divorce court but has the powers of a chancery court also. The chancery court has original jurisdiction over the custody of infants as *parens patriae. Power* v. *Power,* 65 N. J. Eq. 93, 55 Atl. 111, 114; *Hunt* v. *Hunt,* 4 G. Gr. 220; *Mollring* v. *Mollring, supra. Habeas corpus* is the remedy used to obtain possession of a child under this power. 29 Cyc. 1602, note 33. As has been well stated: "It seems a useless circuity to refuse to determine this question in an action in which the parties are before the court and their domestic affairs have been judicially investigated when the same question may be presented to and determined by the same court in a different proceeding." *Jacobs* v. *Jacobs,* 136 Minn. 190, 198, 161 N. W. 525, L. R. A. 1917 D. 971; *Horton* v. *Horton,* 75 Ark. 22, 24, 86 S. W. 824, 5 Ann. Cas. 91; *Mollring* v. *Mollring, supra.*

From a consideration of the cases, in which the Iowa Court has dealt with this question, it is apparent that the Court does not feel itself divested of jurisdiction when a divorce is refused, but does demand that the question be raised by the pleadings and developed by the evidence.

Domicile—Acquisition of Domicile—Revival of Domicile of Origin, When Domicile of Choice is Abandoned.—Evan Jones, a native of Wales, came to this country in 1883, when he was 33 years old and settled in Iowa. He accumulated property, was naturalized, and voted at elections. In 1915, Jones set sail for Wales on the Lusitania, intending to make his home with his sister in Wales; but he was drowned when the ship was sunk by a German submarine. The appellant, an illegitimate child of decedent, claims to be the sole heir and entitled to the whole estate under Code Sec. 3385. Held, that the decedent retained his domi-

cile in Iowa until a new one was actually acquired in Wales, and that appellant was entitled to the property. *In re Jones' Estate,* 182 N. W. 227 (Iowa Sup. Ct.).

Two kinds of domicile are involved in this case: (1) domicile of origin, and (2) domicile of choice. The establishment of a domicile of choice is a matter of physical presence and intent, and both elements must concur before a domicile of choice is established. *Shirk* v. *Monmouth Bd. of Review,* 137 Iowa 230, 114 N. W. 884; *Glotfelty* v. *Brown,* 148 Iowa 124, 126 N. W. 797. While it is well settled that every person must have a domicile somewhere, a person cannot have two domiciles at the same time. *In re Titterington,* 130 Iowa 356, 358, 106 N. W. 761; *Borland* v. *Boston,* 132 Mass. 89, 42 Am. Rep. 424. And the general rule is that a domicile once gained remains until a new one is acquired. *Ayer* v. *Weeks,* 65 N. H. 248, 6 L. R. A. 716, 23 Am. St. Rep. 37; *Plant* v. *Harrison,* 36 Misc. Rep. 649, 74 N. Y. Supp. 411. It is evident from the above that Jones had established his domicile of choice in Iowa and had lost his domicile of origin which was in Wales.

The English courts established an exception to the general rule stated above, at an early date. The leading case on this point is *Udny* v. *Udny,* L. R. 1 H. L. (Sc.) 441, which holds that an acquired domicile may be effectually abandoned by unequivocal intention and act; and that upon such abandonment the domicile of origin revives until a new domicile of choice is acquired. This doctrine of reverter as laid down in *Udny* v. *Udny* is distinctively British, and the outgrowth of the idea of perpetual allegiance. JACOBS, LAW OF DOMICIL, Sec. 202. This idea probably grew out of the supposed desire on the part of the early English trader to have his property descend according to English law. The result was a confusion of domicile with native allegiance. The British prize cases furnished whatever authority there was for the decision in *Udny* v. *Udny,* and those cases deal so much with the matter of allegiance, which has nothing to do with domicile, as to render them unsafe as guides in any cases except those involving national character in time of war. JACOBS, LAW OF DOMICILE, Sec. 198. But in the principal case the decedent had become a naturalized citizen and so the reason for the exception being removed, there could be no ground on which to base the doctrine of reverter. Aside from this, however, whether the decedent was a naturalized citizen should not properly have any effect on the decision, for domicile and native allegiance are entirely distinct. Native allegiance determines the political status, and domicile, the civil status of an individual.

The rule of *Udny* v. *Udny, supra,* has not in general found favor in America. See note, 40 L. R. A. (N. S.) 986, 987, and cases there cited. The majority of the cases "place the adhesiveness of the elective domicile on the same basis as that of the original." WHARTON, CONFLICT OF LAWS, (3rd ed.), Sec. 59. But in support of the doctrine of reverter of the domicile of origin, see STORY, CONFLICT

OF LAWS (7th ed.) Secs. 47 and 48; *The Venus*, 8 Cranch 253, 3 L. ed. 553. Another theory is that while the domicile of origin will revert upon the abandonment of a foreign domicile of choice, if both the domicile of origin and choice are within the same national jurisdiction the doctrine of reverter does not apply. MINOR, CONFLICT OF LAWS, pp. 126-129. This theory seems to find support in *First National Bank* v. *Balcom*, 35 Conn. 351, in which the Court says: "But the principle that a native domicile easily reverts applies only to cases where a native citizen of one country goes to reside in a foreign country, and there acquires a domicile by residence without renouncing his original allegiance. * * * It has no application when the question is between a native and acquired domicile, where both are under the same national jurisdiction." To the same effect, see *Succession of Steers*, 47 La. Ann. 1553, 18 So. 503, 504. But *cf. Allen* v. *Thomason*, 11 Humph. (Tenn.) 536, 54 Am. Dec. 55, which stated by way of dictum that the domicile of origin would revert upon the abandonment of a domicile of choice, and while the person was *in itinere* to the domicile of origin, although both domiciles were within the same national jurisdiction.

There seems to be no valid reason why general doctrines should be upset, and the domicile of origin fictitiously ascribed to a person, despite anything he may do, the moment he abandons a domicile of choice; nor, for that matter, when he sets out for his domicile of origin. The decision in the instant case marks a forward step by applying the same test all the way through, and by holding that a domicile of choice, when abandoned, shall still be that person's domicile until he has acquired a new one, just as the domicile of origin prevails for every person until he has acquired a domicile of choice. It is to be hoped that the decision will be followed by the courts generally.

EQUITY—TEMPORARY INJUNCTION—RESTRAINING INTERFERENCE WITH POSSESSION OF CORPORATE OFFICE.—The plaintiff brought an action in equity to restrain the defendants, a fraternal beneficiary association organized under the laws of Iowa, and one Hoffman from interfering with plaintiff's possession of the office of General Attorney in the defendant association until such time as the right to such office could be determined in legal proceedings. The allegations of the petition were in substance that the board of directors of said association had endeavored to terminate the employment of plaintiff as General Attorney in a manner contrary to the by-laws of such association and that a resolution purporting to terminate such employment had been passed without giving the plaintiff such notice and opportunity to defend himself before the board as he was entitled to under the by-laws. It was further alleged that after the resolution had been passed the board of directors appointed defendant Hoffman to the office of General Attorney and that the latter was about to take possession of the files, cases, briefs, claims, etc. of such office and by fraud deprive plaintiff of the honors, emoluments, and functions thereof. Held, that the injunc-

tion asked for by the plaintiff should be granted. *Denison* v. *Brotherhood of American Yeoman,* 182 N. W. 873 (Iowa Sup. Ct.).

Iowa has repeatedly held that equity has no jurisdiction to try the right or title to an office. *Vette* v. *Byington,* 132 Iowa 487, 109 N. W. 1073; *State* v. *Alexander,* 107 Iowa 183, 77 N. W. 841; *District Tp.* v. *Miles,* 109 Iowa 541, 80 N. W. 544. All of these decisions are based upon the ground that the plaintiff has an adequate remedy at law in a proceeding in the nature of *quo warranto.* § 4313 of the Code provides that, "A civil action by ordinary proceedings may be brought in the name of the state against any person unlawfully holding or exercising any public office or franchise within this state, or any office in a corporation created by this state." Furthermore it is held here, as well as in a majority of jurisdictions, that such statute provides an exclusive remedy for the trial of right or title to a public office or an office of a private corporation. *Schmidt* v. *Pritchard,* 135 Iowa 240, 112 N. W. 801; HIGH ON INJUNCTIONS, 2nd ed., § 235. In the principal case, however, the Court was not called upon to determine finally the right to the office in order to grant the injunction. The petition merely asked for the protection of the plaintiff in his possession of the office until the law court had passed upon the right to it. Granting that the plaintiff could show that he would suffer an irreparable injury if equity would not give him its protection, the Court was undoubtedly right in holding that equity had jurisdiction to grant the temporary injunction. Dicta in some Iowa decisions support the principal case. *Vette* v. *Byington, supra; Schmidt* v. *Pritchard, supra.*

It is clear that in this State the temporary injunction is regarded as a remedy to be invoked only under pressing necessity and that equity will not grant relief unless a strong case is made out by the plaintiff. Furthermore the application is addressed to the discretion of the court and the granting or refusing thereof depends upon the particular facts before the court. *Beidenkopf* v. *Des Moines Life Insurance Co.,* 160 Iowa 629, 142 N. W. 434. In the opinion handed down in the principal case, it seems to have been conceded that the temporary injunction could be properly granted if the court of equity had jurisdiction. The loss of possession of the office for even a short space of time might well cause an irreparable injury to the plaintiff. Furthermore the defendant would not be greatly injured by being forced to remain out of possession even if, in the subsequent proceedings in the law court, he should establish his right to the office. Considering the balance of convenience as between the two parties, it does not appear that the granting of this temporary injunction was an abuse of the discretion lodged in the court.

There are some statements by way of dicta in the opinion to the effect there is a distinction between the situation where an officer in possession of an office is seeking by injunction to restrain interference with his possession, and the case where a claimant of an office is seeking to oust one in possession and obtain possession for

himself. It is stated that injunctive relief will never be given in the latter situation. *Vette* v. *Byington, supra,* makes the same distinction. The Court said in that case that equity could never act in the second situation since the granting of the injunction would depend upon the determination of the title to the office in some respects at least. The Court considered that since a question of legal title was involved equity could not properly take jurisdiction. It is submitted that such a doctrine is too broad. From the language used in the discussion upon this point in the *Vette* and *Denison* cases it would appear that the Court was much influenced by some of the older cases in equity respecting the use of the injunction to restrain interference with, or the holding of possession of, real estate. For example, the Lord Chancellor, Eldon, stated in *Smith* v. *Collyer,* 8 Vesey 89, (1803), that equity could not interfere to restrain the acts of a defendant in possession of real estate if he claimed title adversely to the plaintiff. Some statements in Iowa decisions might lead one upon first glance to believe that this principle laid down by the eminent Chancellor was still the rule of our Court. In *Doige* v. *Bruce,* 141 Iowa 210, 119 N. W. 624, appears the following statement, "To such an action it is sufficient to say that defendant is in possession under a claim of right, and that the plaintiff has not the possession of the property. Courts of equity will not attempt to adjudicate the title or right of possession." The similarity of the language used in that case dealing with real property to that used in the principal case dealing with the possession of an office is apparent. Equity jurisdiction with reference to the granting of injunctions to restrain one from using or continuing in possession of real property has not been limited to the extent that this statement in the *Doige* case might imply. While equity is yet very cautious about interfering in situations where a question of legal title is involved, and does not purport to try such questions, it cannot be laid down as a general rule that the possession of real estate by one claiming legal title cannot be interfered with. In the *Doige* case in another part of the opinion than that before referred to the Court stated: "That of course there may be cases of irreparable injury from a trespass where courts of equity will interfere by injunction." Furthermore the Iowa Court has acted to transfer the possession of real estate. *Ten Eyck* v. *Sjobourg,* 68 Iowa 625, 27 N. W. 785. These decisions show that the equity jurisdiction with reference to the possession of real property has not been limited in this state in accordance with Lord Eldon's view in the early English decision. The general doctrine would appear to be something like this: that while equity is still cautious about interfering where a question of legal title is involved, a plaintiff out of possession may have equitable relief by injunction if he can make out a case strong enough to show his right to the property; and can show further that unless equitable relief is given him he will suffer an irreparable injury, an injury to his right which would be much more serious than that which would result to the party in possession if the latter should improperly be

deprived of possession. In other words it is the balance of convenience as between the parties that guides the court in the exercise of its discretion to grant or refuse relief. In the great majority of cases, the position of the party in possession is sufficient to induce the court to refrain from disturbing him because of the inconvenience that would result if he should later turn out to be entitled. The mere fact, however, that there is a question of legal title involved does not of necessity determine whether relief shall be given. This is the doctrine of a majority of jurisdictions at the present time. 4 POMEROY'S EQUITY JURISPRUDENCE, § 1357.

In the light of these decisions of our Court respecting real property it would seem that the dicta in the *Vette* and principal cases —that equity will never act to restrain or oust a person in possession of a corporate office—are too broad. Equity might well be cautious about granting an injunction in such a situation but could properly act in case the plaintiff could show that he would suffer a very serious injury if denied relief. A good rule would appear to be that followed in some other jurisdictions, which is that a court of equity may determine the validity of an election when such issue arises in a suit properly brought into equity upon other grounds. *Mechanics Nat. Bank* v. *Burnett Mfg. Co.*, 12 N. J. Eq. 236; *Pond* v. *Vermont Valley R. Co.*, Fed. Cas. No. 11,264.

HUSBAND AND WIFE—CONTRACTS IN CONSIDERATION OF MARRIAGE —STATUTE OF FRAUDS.—The plaintiff seeks to enforce specific performance of an oral contract which she alleges was entered into between herself and her deceased husband in contemplation of their marriage. By the terms of the alleged contract she promised to marry, nurse, care, and work for deceased the rest of his life. In return, he was to will or deed to her all of the property of which he might die possessed or entitled. Plaintiff actually married and cared for deceased until the time of his death. Held, the contract was not specifically enforceable because the services performed were of a character that were required by the marriage relation and therefore were not sufficient consideration to support the promise. *Bohanan* v. *Maxwell*, 181 N. W. 687 (Iowa Sup. Ct.).

The case raised two questions: First, as to the enforceability of the promise under Code § 4625 which provides in part that no evidence of a contract in consideration of marriage is competent unless in writing and signed by the party sought to be bound, or his authorized agent; and secondly, whether there was sufficient consideration to support the promise.

It would seem that the case could have been disposed of entirely upon the question raised under the above section of the Statute of Frauds. Plaintiff could hope to avoid that section only by showing a change of position such that a refusal to enforce the promise would have worked a fraud upon her. But in this situation the courts have been universally constant in holding that marriage alone does not take a contract, made in consideration of marriage, out of that clause of the Statute relating to such contracts. Nor is it good

as part performance. For a collection of authorities see 36 CYC. 649. The same attitude has caused the courts to set aside, in favour of creditors, a conveyance made in pursuance of a parol antenuptial promise. 20 CYC. 507.

The reasoning used by those authorities is not so convincing. As a matter of principle it would seem obvious that marriage is a vast change of position. See BROWNE ON THE STATUTE OF FRAUDS, § 459. But as a matter of policy the courts have uniformly held the contrary. It is said that by its very definition, such a contract could not become binding until the marriage, and to hold the act which brings the contract into existence also removes it from the statute, would be to nullify the clause in every instance. *Lloyd* v. *Fulton*, 91 U. S. 479. The situation, it is said by Justice Story, must be looked at from the standpoint of policy, and be considered apart from the ordinary situation of contracts. STORY EQ. JUR. § 768.

Nor can the services rendered amount to a change of position or part performance sufficient to take the case out of the Statute of Frauds because services such as were performed by the plaintiff flow from and are directly incident to the marriage relation. As pointed out above the act of entering into the marriage relation could not be part performance; therefore the same must be true of those things incident to it. Moreover, as another distinct ground for the same conclusion, such services, in order to stand as part performance must have been referable to the promise to convey. *Philips* v. *Thompson*, 1 Johns. Chanc. 149; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Chanc. 283. The services here alleged to have been performed could be referable to the marriage alone.

Aside from the question of enforceability under the Statute of Frauds however, and merely from the standpoint of sufficiency of consideration, the case takes on an entirely different aspect. It may well be granted, as pointed out above, that the services rendered were only the performance of a legal obligation. Even so, it is difficult to see how the Court avoids the line of authorities treating marriage as a valuable consideration. It is settled, almost beyond dispute, that settlements made in consideration of and previous to marriage are considered as entered into between the parties upon a good consideration. 13 R. C. L. 1015; *Wright* v. *Wright*, 114 Iowa 748; PEACHEY ON MARRIAGE SETTLEMENTS, 62. Where enforceability under the Statute of Frauds is not in question, marriage has been looked upon as a valuable consideration. In *Magniac* v. *Thompson*, 7 Peters 348, 393, Justice Story states the proposition as follows:—"Marriage, in contemplation of law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with a steady resolution."

It is interesting to note that since the contract discussed in the principal case is alleged to have been entered into, the legislature has passed an act which may or may not play an important part in such cases. Code Supp. Supp. § 3477-a gives to a wife, or in

case of her death to her administrator, the right to recover for her loss of services as a wife or mother. This section was passed upon in *Jacobson* v. *Fullerton,* 181 Iowa 1195; and in *Bridenstine v. Railway Co.,* 181 Iowa 1124. In those cases it was determined that the husband no longer has a right to recover for the loss of services of his wife. Just what effect that statute and the above decisions may have upon the performance of services by a wife as part of the consideration of a contract, remains to be seen.

In *Bohanan* v. *Maxwell, supra,* the Court indicates that in its opinion the effect of the statute should be restricted to cases where third persons are involved. But even as between husband and wife can it be said, under § 3477-a, that the wife is legally obliged to perform the services ordinarily incident to the marriage relation? Does the husband have left to him any more than a right to the wife's consortium?

If he does have more, how is it guaranteed to him. Certainly he has no right against a third person for the loss of the wife's services. As against her, he cannot compel specific performance. Would it lie for the husband, since the statute, in a situation such as occurred in *Bohanan* v. *Maxwell,* to set up that in performing the household services the wife was doing only what she is legally bound to do?

It may have been the intention of the Legislature merely to render the situation simpler from a procedural standpoint, but in doing so, they have placed the husband in a situation very closely analogous to that of the owner of property which has fallen into the hands of an adverse possessor and has been held through the statutory period for bringing an action. Upon the loss of the remedy the courts have said that his right is also lost. *Campbell* v. *Holt,* 115 U. S. 620.

HUSBAND AND WIFE—CRIMINAL CONVERSATION—EFFECT OF DIVORCE SECURED BY WIFE ON HUSBAND'S ACTION.—The plaintiff brought an action against the defendant on two counts, one for criminal conversation and the other for alienation of affections. The answer alleged that since the alleged acts complained of the wife had obtained a divorce. Held, that the fact alleged in the answer constituted a sufficient defense to the suit of the plaintiff. *Duff* v. *Henderson,* 183 N. W. 475 (Iowa Sup. Ct.).

The decision is based primarily upon Sec. 3181 of the Code which provides that, "When a divorce is decreed the guilty party forfeits all rights acquired by the marriage." The decision overrules *Wood* v. *Mathews,* 47 Iowa 409, on the criminal conversation point. On the count for alienation, *Hamilton* v. *McNeill,* 150 Iowa 470, 129 N. W. 480, is followed. The Court in the latter case did not purport to overrule *Wood* v. *Mathews* but professed to distinguish an action for criminal conversation from one for "simple alienation by alleged acts and arts not in themselves criminal."

In so far as the principal case disregards the attempted distinc-

tion made in the *McNeil* case it would seem to be sound. It is true that the actions differ in some respects. The plaintiff in an action for criminal conversation must show that the defendant had intercourse with the spouse of the plaintiff during the marital relation while in an alienation suit it is only necessary to show an intentional enticement of the spouse by the defendant. *Maloney v. Phillips,* 118 Iowa 9, 91 N. W. 757. In either instance, however, there is an infringement of only one right in the plaintiff which is the exclusive right of the one spouse to the love and affection of the other. There is no real distinction between the two actions so far as the forfeiture mentioned in the statute is concerned.

Beyond this point the decision in the principal case is, it is submitted, at least questionable. Without such a statute, by the weight of authority, the party against whom a divorce decree was granted was not precluded from bringing an action against a third party for alienation or criminal conversation. 9 R. C. L. 496; Ann. Cas. 1912 D, 604. It is noteworthy that in the *Wood* case where, so far as the decision shows, the statute was not brought to the attention of the Court, the decision is in line with the majority holding at common law. In practically all minority decisions where the point is discussed fully the courts seem to rely upon the principle of estoppel by judgment. See *Gleason* v. *Knapp,* 56 Mich. 291, 22 N. W. 865. As pointed out by Deemer, J., in the dissenting opinion in *Hamilton* v. *McNeill,* this principle can only be applied properly between parties and privies to the judgment upon which the estoppel is based. The defendant in the principal case was not a party to the divorce proceeding between the plaintiff and his wife.

If the decisions in the *McNeill* case and the case at hand are to be sustained it must be by reason of Code Sec. 3181. In fact the majority opinion in the former case was based professedly upon the statute although there was some attempt to show that the same result could be reached at common law. The main question presented in the application of the statute to the state of facts involved would be whether the right of the spouse to bring an action for criminal conversation or alienation is a right acquired by the marriage. The Supreme Court of Missouri in interpreting a statute practically identical in phraseology with Sec. 3181 held that the right of action aforementioned was not a right acquired by the marriage within the meaning of the statute. *Deford* v. *Johnson,* 251 Mo. 244, 158 S. W. 29. The Court said in that case that the rights referred to in the statute were rights between the parties to the marital relation and had no reference to rights acquired by one spouse through the tortious acts of third persons. A point well brought out there was that there would no more be a forfeiture of the husband's right to bring action for alienation than there would be a forfeiture of the husband's right to bring action against one who negligently injured the wife causing a loss of services to the husband. The Missouri Court considered that the statute was enacted to clear up mooted questions as to the rights of the

one divorced spouse in the property of the other. Early Iowa decisions show that these same questions arose in this State. *McCraney* v. *McCraney,* 5 Iowa 231; *Marvin* v. *Marvin,* 59 Iowa 699, 13 N. W. 851. If the Iowa legislature intended to provide for forfeiture of other rights than those in the property of the divorced spouse as the majority of the Court in *Hamilton* v. *McNeill* thought it did, what would be the limit of rights to be forfeited upon divorce? Would a party against whom a divorce decree was granted be precluded from bringing an action for the seduction of a minor daughter because his right to bring such action arose indirectly out of his marriage?

The instant case, and the problems presented by it, show the need for legislative action to define, more precisely, what is meant by the indefinite phrase, "rights acquired by the marriage."

TRIAL—FUNCTIONS OF COURT AND JURY—EFFECT OF MOTION TO DIRECT VERDICT BY BOTH PARTIES.—At the close of all the evidence in the trial of a case, both parties moved for a directed verdict. The court admitted that there were facts which, if both parties had not requested peremptory instructions, would have warranted him in submitting the case to the jury, but, assuming that the motion by both parties was a waiver of a jury trial, directed a verdict for the defendant. Held, that the court erred in directing a verdict. There is no implication of a waiver of a jury trial from the mere fact that each party asks a peremptory instruction. *Manska* v. *San Benito Land Co.,* 184 N. W. 345 (Iowa Sup. Ct.).

It is a well settled rule in Iowa that, where the evidence is conflicting and sufficient to go to the jury, if both parties request a directed verdict and do nothing more, the case should be submitted to the jury. *Hamill* v. *Brewing Co.,* 165 Iowa 266, 294, 143 N. W. 110. There is an early Iowa case which seems to have approved a rule that where both parties ask a peremptory instruction, the case should be taken from the jury and decided by the judges. In this case, the Court said, "It seems to us that there was no dispute as to the facts which were material to this controversy. Whether that be so or not is immaterial, as the court discharged the jury after he had been asked to do so by both parties. In this action there was no error." *First Natl. Bank.* v. *Crabtree,* 86 Iowa 731, 52 N. W. 559. But a long list of subsequent Iowa decisions shows that the Iowa court has never actually adopted this rule. In the first case subsequent to *First Natl. Bank* v. *Crabtree* in which the question was brought squarely before our court, the rule was laid down that where both parties ask a directed verdict, in the absence of express waiver of a jury trial, the issues of fact should be submitted to the jury. *German Savings Bank* v. *Bates,* 111 Iowa 432, 82 N. W. 430.

There are, however, two recent Iowa cases which seem to indicate a slight departure from the Iowa rule. *Murray* v. *Brotherhood,* 180 Iowa, 626, 163 N. W. 421; *Conkling* v. *K. & L. Security Co.,* 183 Iowa 665, 166 N. W. 384. Excepting these two cases, all other

Iowa cases have followed the rule of *German Bank* v. *Bates. Walker v. Fruit Co,* 113 Iowa 428, 85 N. W. 614; *Teeple v. Dredging Co.,* 137 Iowa 206, 214, 114 N. W. 906; *Hamill v. Brewing Co.,* 165 Iowa 294, 143 N. W. 110.

Opposed to the Iowa rule is the New York rule that, if both parties ask a directed verdict and do nothing more, the Court should take the issue from the jury; but that if either party, subsequent to the motions for directed verdict, asks to go to the jury, the issues of fact must be submitted to the jury. *Smith* v. *Weston,* 159 N. Y. 194, 54 N. E. 38; *Signa Iron Co. v. Brown,* 171 N. Y. 488, 64 N. E. 194. The Federal Courts seem to follow the New York rule. *Buettell* v. *Magone,* 157 U. S. 154; *Empire Cattle Co.* v. *Ry.,* 210 U. S. 1.

The only difference between the two rules is that by the Iowa rule the disputed facts must be submitted to the jury without a subsequent request, but in the case of the New York rule, the question can go to the jury only by a subsequent express request by one of the parties. From a comparison of the two rules, it seems that the one followed by the Iowa courts is far more preferable. It has the support of most respectable authority in other jurisdictions. *Wolf* v. *Printing Co.,* 233 Ill. 501, 84 N. E. 614; *Lonier* v. *Bank,* 153 Mich. 253, 116 N. W. 1088; *Pappitz* v. *Ins. Co.,* 85 Minn. 118, 88 N. W. 438; *Bank* v. *McCall,* 25 Okla. 600, 106 Pac. 866; *Hite v. Keene,* 149 Wis. 207, 134 N. W. 383. The Iowa rule is more reasonable than the New York rule. The mere fact that a party to a litigation contends that the evidence demands a finding in his favor does not amount to a concession that, if this position is not correct, a verdict may be directed in favor of the other party. On the contrary, a contention that the evidence demands a verdict for one party prima facie includes the contention that it does not demand a verdict in favor of the other. *Broadhurst* v. *Hill,* 137 Ga. 833, 74 S. E. 422. The Iowa rule seems less technical than the New York rule. The fact that the first party's motion is followed by that of the second party should not in any way affect the rights of the first mover. Each motion should be disposed of on its own merits. The parties merely assert that they believe only a question of law is involved; but these assertions are merely expressions of opinion calling upon the judge to determine whether there is a conflict in the evidence. *Virginia Hardware Co.* v. *Hodges,* 126 Tenn. 370. The Iowa rule seems to carry out the intention of the parties. It seems that where both parties move for a directed verdict, neither is willing, as against the other, to waive a jury, but each is impliedly asking, as against the other, that, if there are debatable facts which it was the province of the jury to determine, these facts should be submitted to the jury. *German Savings Bank* v. *Bates,* 111 Iowa 432, 82 N. W. 430.

IOWA LAW BULLETIN

Volume VII MARCH, 1922 Number 3

MISTAKE AND ADVERSE POSSESSION.

Adverse possession owes much to English common law notions of possession. It owes its name, apparently, to an English judge, Lord Mansfield.[1] And yet adverse possession is primarily American. England once had its law of disseisin, now it has its statute of limitations but the American law of adverse possession is neither of these for it differs vitally from the old disseisin[2] and is not to be discovered in the language of most statutes of limitation but has been read into them by the courts.[3] The terms used by the old English common law where one held land to which another was entitled, dispossession, disseisin, devestment, discontinuance, show that it looked at the situation from the point of view of the one out of possession. The American "adverse possession" on the other hand lays stress on the one in possession. Instead of a doctrine of negative prescription as the law of the English Limitations Act may properly be called, it is a law of affirmative prescription.[4] The title of the old owner is gone because a new one has come into being which is incompatible with the old. The destruction of the old title is the consequence of the creation of the new and where no new title is created, the old continues and with it the remedies for the recovery of the land notwithstanding

---

[1] *Taylor d. Atkyns* v. *Horde*, 1 Burr. 60, 119.

[2] 34 Harvard Law Review 623.

[3] This was also true of adverse possession as developed in England prior to the Real Property Limitation Act of 1833. See the remark of counsel in *Nepean* v. *Doe*, 2 M. & W. 894, 900. Adverse possession promised to have a life of its own in England but this was cut short by the Real Property Limitation Act. It was only in America that it developed into maturity.

[4] The late Dean Ames says: "In the English law, no less than in the Roman law, title is gained by prescriptive acquisition." (3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 567). His authorities however are either American or cases decided under the English Real Property Limitation Acts (*id.* 571). They show that the gaining of title by prescriptive acquisition is now a part of the law in both England and the United States. In the former the prescription is negative, in the latter affirmative.

these may have been available for the recovery of the land for more than the statutory period.[5]

It has been said that the English common law unlike the Roman Law looked to the demerit of the one out of possession and not to the merit of the one in possession.[6] To a certain extent this is true of the American law of adverse possession as well for in general its efficacy is not affected by the bad faith of the occupant.[7] Fundamentally however it is not true of the American law of adverse possession for in determining whether the old owners rights have been cut off the American courts have been guided by the determination of the question as to whether a new title has and should have been gained. For instance, a common requirement for the acquisition of title in the United States has been that the occupancy should have been under claim of title[8] and the title gained is limited to the extent of the claim.[9] If the occupant claims a life estate, he will not gain to himself a fee.[10] Tiffany is right in saying that this is something foreign to the English common law.[11] To deny it a place in the American Law, however, is to ignore the essentially American character of adverse possession.[12]

It was Judge Story who put the law of adverse possession on its modern basis.[13] It had been a maxim of the English law that a wrongdoer could not qualify his own wrong. In its origin this maxim was probably remedial. The assize of novel disseisin was at one time a popular remedy and the defendant who had been guilty of what was properly no more than a trespass might find

---

[5]Perhaps the best two examples of this are that there must be privity of estate between adverse possessors to cut off the old title and that adverse possession must be under claim of title.

[6]Ames, 3 SELECT ESSAYS 567.

[7]2 TIFFANY, REAL PROPERTY, 2 ed., 1940. Iowa is the notable exception to the general rule in requiring good faith of the adverse possessor. *Litchfield* v. *Sewell*, 97 Iowa 247; *Goulding* v. *Shonquist*, 159 Iowa 647; *Dwyer* v. *Christianson*, 188 Iowa 686.

[8]2 TIFFANY, REAL PROPERTY, 2 ed., 1936.

[9]Ballantine, "Claim of Title in Adverse Possession," 28 Yale Law Journal 220.

[10]*Ricard* v. *Williams*, 7 Wheat. 59, 108.

[11]2 REAL PROPERTY, 2 ed., 1938.

[12]Tiffany's whole exposition of the law of adverse possession is a desperate attempt to escape from the logical consequence of the American cases that the American law of adverse possession is affirmative and not negative prescription. See, for example, *id.* 1923.

[13]*Ricard* v. *Williams*, 7 Wheat. 59, 105-108.

himself precluded from urging this in his defense to the assize.[14] His act might be considered a disseisin at the *election* of the one bringing the action although not sufficient to deprive the latter of the general advantages of one who had seisin of freehold. The number of these acts which might be considered disseisins at election became very large.[15] But in England the operation of the maxim that a wrongdoer could not qualify his own wrong was much broader than this. If a tenant for years made a feoffment for life, the feoffee, it is true, became seised of only a life estate but the tortious feoffment operated to devest the old fee, and for the time being at least the fee was in the tortious feoffor. So if one entered on land knowing he had no right there and claimed a term for years, he could not qualify his own wrong but was considered to hold in fee.[16] Mr. Justice Story, however, stamped the maxim as remedial only,[17] asserted that while possession was presumed to be of right, there was no presumption that it was in fee, that where a man's interest in land was possessory only, the law would attribute to him no greater interest than he claimed. This doctrine has been generally accepted as applicable to the acquisition of titles under the statute of limitations. Claim of title is generally held essential to gaining title under the statute and one who claims less than a fee will not acquire one.

Even the English courts, however, hesitated to apply the doctrine that a wrongdoer could not qualify his own wrong to a case where a man held land without authority but under a mistake.[18] There was here no intention to oust the one having the right and it seemed to be going too far to hold a man to all the disabilities of a disseisee because some one else was in possession of his land under what he supposed was a valid term for years. There was here no conscious hostility to the old owner and the more progressive judges were inclined to regard the case as one of disseisin at election rather that of strict disseisin.[19]

That there was no disseisin where the land was held under a mistake was not, as far as the writer knows, applied in England

---

[14] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 53.

[15] POLLOCK AND WRIGHT, POSSESSION, 89.

[16] 2 PRESTON, ABSTRACTS OF TITLE, 293, 316; CHALLIS, REAL PROPERTY, 3 ed., 405; Co. LIT. 271a; *Mayor and Commonalty of Norwich* v. *Johnson*, 3 Lev. 35.

[17] 7 Wheat. 107; see also STEARNS, REAL ACTIONS, 6, 75.

[18] *Blunden* v. *Baugh*, Cro. Car. 302.

[19] 34 Harvard Law Review 621.

to the case of the mistaken boundary. This was done however in an early Maine case.[20] There it was laid down that "if the owner of a parcel of land, through inadvertency or ignorance of the dividing line includes a part of an adjoining tract within his enclosure, this does not operate as a disseisin, so as to prevent the true owner from conveying and passing the same by deed." This was a progressive decision in line with the tendency of the English cases to cut to a minimum the rule that the owner out of possession could not transfer his land. The statute of limitations and the gaining of title by adverse possession were not touched on in the case and it properly has no bearing on them. Unfortunately it gave rise to the impression that in order for title to be gained by adverse possession the land must be held with an intent consciously hostile to the true owner.[21] And this impression it is hard to kill. One cannot steal land but the moral quality of deliberately taking a man's land would not seem to be conspicuously higher than of deliberately taking his watch and while it may be desirable that the mantle of the statute of limitations should cover alike the just and the unjust, it would seem strange that the unjust should be preferred and that one who has held land under claim of title, albeit mistaken, should be denied title. And to this result most, if not all, the courts which were led astray by the often unconscious influence of the old disseisin have come.[22]

There still remains the question, however, as to the effect of the mistake on the claim of title. If A has a deed to lot 1 and by mistake puts his fence three feet over on lot 2, does he occupy the three feet under claim of title or not? He may hold the three feet as owner and in that sense, under claim of title, but assuming that he is ignorant of anything wrong about the location of his fence, would he not if he were asked as to what land he claimed, probably say that he claimed title to lot 1. He has title to lot 1

[20] *Brown* v. *Gay*, 3 Greenl. 126.

[21] This has arisen from an identification of adverse possession with the old disseisin and a reading into adverse possession of Coke's old definition of a disseisin (Co. Litt. 153b) to the effect that "a disseisin is when one enters, intending to usurp the possession, and to oust another of his freehold."

[22] See Gray's note to *Grube* v. *Wells* in 3 Cases on Property, 2 ed., 59. He cites *Taylor* v. *Fomby*, 116 Ala. 621, 627 (1897); *Shotwell* v. *Gordon*, 121 Mo. 482, 484 (1894); *Miller* v. *Mills County*, 111 Iowa 654, 658 (1900); and *Richardson* v. *Watts*, 94 Me. 476, 487 (1901) as marking a departure from the earlier decisions in those states which would have appeared to make mistake absolutely incompatible with adverse possession.

and probably that is the extent of his conscious claim. He holds the three feet as owner however and ordinarily this is all that is necessary for claim of title but in the more literal sense he only claims lot 1, so that whether he is to be said to hold the three feet under claim of title or not will depend on which meaning is given to claim of title. The two meanings in this sort of a case lead to opposite results.

Mr. Justice Holmes has likened the situation to the case where A fires at B thinking the latter to be C. In one sense he intends to kill B for he intends to kill the man in front of him, but his conscious intent is to kill C. In such cases his intention directed towards the physical object before him, overrides the inconsistent intention to kill C. Justice Holmes would apply the same principle here. He says:

"the direction of the claim to an object identified by the senses as the thing claimed overrides the inconsistent attempt to direct it also in conformity to the deed, just as a similar identification where a pistol shot is fired or a conveyance is made overrides the inconsistent belief that the person aimed at or the grantee is someone else.'"[23]

A more usual way of handling the situation is to seize on one of the two conflicting intentions and to call that 'intention' and the other 'belief' or 'motive.' Thus in *French* v. *Pearce*,[24] the intention to enter on the land in controversy and to hold it as his own, was deemed to be the claimant's real intention while his intention to hold under the deed was described as 'motive.' On the other hand in *Grube* v. *Wells*,[25] it was the intention to hold under the deed that was designated as 'intention' and this was contrasted with the claimants 'belief' that the land was his own.

This unfortunate conflict in the authorities is a natural concomitant of the not very happy phrase 'claim of title.'[26] It would literally seem to imply an express assertion of title but in the ordinary case no court requires such assertion but is satisfied if the occupant acts as owner. Why some courts should attach a different meaning to claim of title in boundary disputes than in other cases is hard to see. Perhaps there has been the feeling that in the case of the mistaken boundary line there is not as much to put the owner on his guard as where the land is occupied by one who is not a neighbor.

---

[23] *Bond* v. *O'Gara*, 177 Mass. 139.

[24] 8 Conn. 439.

[25] 34 Iowa 148.

[26] For a criticism of this phrase see 2 TIFFANY, REAL PROPERTY, 2 ed., 1939.

But whatever reasons there may be for holding the claimant to a stricter proof of claim of title in boundary disputes than in others, the net difference between the two lines of authorities is not as great as might appear. The difference is largely a matter of probability. In states like Iowa where mistake is material in so far as it affects claim of title, the presumption is rather in favor of the old owner; in states where the other view is held the presumption is rather the other way.[27]

The Iowa Law

In Iowa the tendency at first was to favor the one holding under a mistake rather than the old owner. In *Burdick* v. *Heivly*,[28] the court said:

> "To our apprehension one of the objects of the statute of limitations is to compose controversies growing out of mistakes and errors of this kind, which tend to keep open indefinitely the settlement of land titles, and render them more insecure and uncertain."

In *Close* v. *Samm*,[29] Cole, J., by way of illustration would have attributed to the occupant of the boundary strip even 'color of title.' In *McNamee* v. *Moreland*,[30] Wright, J., refused to pass on the correctness of the doctrine favoring the old owner laid down in an Alabama case and said:

> "It is possible that it carries the rule too far, and indeed that it does not impair too much the force and effect of actual adverse possession may be questioned. For every party who builds his fence, or otherwise takes adverse possession to a certain line, is supposed to do so with the belief that he has the right under his title, and with no intention to claim what is beyond the true line."

A few years later, however, in 1871, the Supreme Court shifted its favor and in *Grube* v. *Wells*,[31] aligned itself with the courts of Alabama and Maine. In another case decided at the same time[32] the court applied its new doctrine against the claim of the public to a right of way which had been used upward of twenty years and had during that time been marked by a fence as to which there had been general acquiescence. This case seems to have been squarely opposed to *Burdick* v. *Heivly* but the latter was not cited.[33] Beck,

---

[27] See *id.* 1949.

[28] 23 Iowa 511.

[29] 27 Iowa 503.

[30] 26 Iowa 96.

[31] 34 Iowa 148.

[32] *The State* v. *Welpton*, 34 Iowa 144.

[33] See the opinion of Ladd, J., in *Miller* v. *Mills County*, 111 Iowa 654, 661.

C. J., delivered the opinions in the two cases and his language would seem to require an intent consciously hostile to the old owner. He was evidently influenced by the old law of disseisin which he had elaborated as counsel in *Jones* v. *Hockman.*[34] However, it was *claim of right,* rather than conscious hostility to the true owner on which he laid special emphasis as an essential element in adverse possession and it is in this respect that *Grube* v. *Wells* has been followed to this day.

Much of the force of *Grube* v. *Wells* has been lost because of the now accepted doctrine that if there is acquiescence in a boundary line for the period of the statute of limitations the same is binding notwithstanding a mistake as to the original line.[35] If this doctrine were confined to cases where there is an express agreement on a division line or fence, it would nevertheless have frequent application, but express agreement is not necessary. In the leading case of *Miller* v. *Mills County,* Ladd, J., says:

"There was no express agreement between the parties to this case, or their grantors, that the fence be regarded as marking the boundary between their respective tracts of land, but the circumstances are such that an agreement ought to be implied. For more than eighteen years they have occupied up to and acquiesced in the division fence, and maintained it as the true boundary between them. They adopted it by their unmistakable acts, which in any other transaction would have all the force of implied contracts. *Davis* v. *Curtis,* 68 Iowa 63."

And in *Keller* v. *Harrison,*[36] the same judge says:

"Acquiescence does not presuppose an agreement to a line. Nor is it essential that the jury find such agreement, express or implied, as a condition precedent to the application of the doctrine as it was told. On the contrary, an agreement to a boundary is to be inferred from long acquiescence."[37]

Since *Miller* v. *Mills County,* therefore, where one claims a boundary strip which he has been occupying by mistake, what he may fail to gain on the ground of adverse possession, he is very likely to gain on the ground of acquiescence. What is denied on the principle of *Grube* v. *Wells,* may be granted on the principle of *Miller* v. *Mills County.* The net effect of the two principles is

[34] 12 Iowa 101, 102.

[35] *Miller* v. *Mills Co.,* 111 Iowa 654; *Klinkner* v. *Schmidt,* 114 Iowa 695; *Lawrence* v. *Washburn,* 119 Iowa 109; *O'Callaghan* v. *Whisenand,* 119 Iowa 566; *Rattray* v. *Talcott,* 124 Iowa 398; *Morley* v. *Murphy,* 179 Iowa 853; *Hughes* v. *Rhinehart,* 180 N. W. 643.

[36] 139 Iowa 383, 394.

[37] See also *Hughes* v. *Rhinehart,* 180 N. W. 643. Cf. *Dwight* v. *City of Des Moines,* 174 Iowa 178, 185 and *Griffin* v. *Brown,* 167 Iowa 599, 609.

that if a man builds a fence which it is clear he intends as a boundary fence or in any other way marks out a boundary line so that its character as such is brought home to the adjoining owner and occupies up to that line for ten years and the adjoining owner occupies up to that line for ten years, without protest on his part, then such line becomes the true line between them notwithstanding it originated in mistake and that there was no intention to oust anyone from his freehold. The Iowa decisions prior to *Miller* v. *Mills County* were tending to this result on the ground of adverse possession[38] and the opinion in that case would indicate that the court would not have been unwilling to have placed their decision on that ground. However the less controversial ground of acquiescence presented itself and was the ground on which the decision was placed and on which it has been followed. That the decision was placed on the ground it was makes at least this difference that protests which are sufficient to preclude acquiescence would not be sufficient to interrupt adverse possession.

But while the decision in *Miller* v. *Mills County* was thus placed on the ground of acquiescence, the opinion did much to clarify the law of adverse possession and to bring the Iowa law in line with the more recent decisions[39] in the states which, like Iowa, have been inclined against finding an adverse possession where there has been a mistake. While still attaching importance to mistake these decisions do not regard it as fatal to adverse possession and thus free the law in their states from the old law of disseisin and its requirement of a consciously hostile intent. They do regard mistake as bearing on claim of title, however, and are inclined to presume a claim of title in accordance with the deed rather than in accordance with the land actually occupied.[40]

The indirect effect of *Miller* v. *Mills County*, therefore, was to eliminate that part of the opinion in *Grube* v. *Wells* which would seem to have required for adverse possession an intent consciously hostile to the old owner, and to emphasize that part of the opinion that laid stress on claim of right or title. It also greatly narrowed the application of any presumption that in case of mistake a man would be presumed to claim according to his deed and not according to the land actually occupied, by abandoning adverse posses-

[38] *Fullmer* v. *Beck*, 105 Iowa 517; *Doolittle* v. *Bailey*, 85 Iowa 398; *Heinrichs* v. *Terrell*, 65 Iowa 25.

[39] See *supra*, n. 22.

[40] See *Jahnke* v. *Seydel*, 178 Iowa 363, 368. For the cases in other states see 2 TIFFANY, REAL PROPERTY, 2 ed., 1949, n. 93.

sion altogether where, as would probably most frequently happen, there had been agreement to or acquiescence in the mistaken boundary line. Occasional instances may arise where a fence is built on the wrong line and the adjoining owners occupy up to that fence in peace and quietness for the statutory period without the principle of acquiescence coming into play but they are likely to be rare. When the fence is a make-shift affair, it can have little significance as a claim of boundary and the principle of acquiescence would not be applicable[41] but it is probable that there are few states which would consider the possession in such a case to be under claim of title so that the result would be the same in those states, like Iowa, which presume that the intention is to claim according to the deed, and in those states which do not indulge in any such presumption.

Where the holder of the paper title allows his land to lie idle and the boundary fence is built without any agreement on his part, acquiescence is out of the question and *Grube* v. *Wells* as explained by *Miller* v. *Mills County* has free play. But it is believed that it is only in such case of idle land that *Grube* v. *Wells* has much place. Except, in rare cases, therefore, what is said about the rule of *Grube* v. *Wells* in cases where both pieces of land are occupied up to the mistaken boundary line is largely *dictum* and we must look to the cases where the land of the holder of the paper title has lain idle to get the authoritative interpretation of the rule. Probably the tendency in such cases to prefer the claim of title under the deed rather than the inconsistent intention to hold the strip of land as owner will continue but it may well be doubted whether this discrimination in favor of the owner of idle land is justified. Certainly it would seem that any presumption in favor of the absentee landlord should easily give way before positive acts of ownership exercised over the strip in question and that the possessor should not be tempted to perjure himself to assert a hypothetical intention to acquire title if perchance he were mistaken, when only in rare cases would such hypothetical intention have ever been formed. It is to be hoped that the presumption in favor of the absentee landowner will rarely prevail.[42]

PERCY BORDWELL.

---

[41]Such a case was *Bolts* v. *Colsch*, 134 Iowa 480. See also *Webster* v. *Shrine Temple Co.*, 141 Iowa 325.

[42]But see *Poleske* v. *Jones*, 185 N. W. 917.

ACTIONS *IN PERSONAM* AND ACTIONS *IN REM* IN IOWA.

The writer's attention was recently called to an address delivered by George F. Henry of Des Moines, Iowa, before the American Association of Title Men wherein the conclusion is reached that:

"It seems to me, from a reading of the cases which I have cited, that the Supreme Court has clearly held that proceedings brought by guardians and administrators for the sale of real estate are proceedings *in personam* and not proceedings *in rem*, and that service of notice in said proceedings by publication or registered mail or by personal service outside the state does not confer jurisdiction upon the court. And this in spite of the express provisions of Sec. 3324, of the Code, providing that a different notice may be prescribed by the court or judge. Adopting the reasoning in *Raher* v. *Raher*, 150 Iowa 511, it seems to me that the final clause in Sec. 3324, is unconstitutional, for the reason therein given against the similar provision in Sec. 3800."[1]

This conclusion Mr. Henry says he has reached from the holding of our Supreme Court in the following cases: *Good* v. *Norley*,[2] *Washburn* v. *Carmichael*,[3] *Lyon* v. *Vanatta*,[4] *Boyles* v. *Boyles*,[5] *Gregg* v. *Myatt*,[6] *Dillavou* v. *Dillavou*,[7] *Raher* v. *Raher*,[8]; and the Ohio case of *Cross, Administrator* v. *Armstrong*.[9]

Let us briefly examine the cited cases to see whether the conclusion reached necessarily follows. Much stress is laid upon the statement of the court in all these cases, that the action was *in personam* and not *in rem*, and the position is assumed that because the actions were held to be *in personam* that service of notice by publication or otherwise than by personal service within the state would not and did not confer jurisdiction on the court to determine the questions involved.

In actions or proceedings which are purely *in rem* no notice whatever is necessary if the court gets jurisdiction of the *res* in some

---

[1]Proceedings of the Fifteenth Annual Convention, American Association of Title Men (Sept., 1921) p. 229.

[2]28 Ia. 188 (1869).

[3]32 Ia. 475 (1871).

[4]35 Ia. 521 (1872).

[5]37 Ia. 592 (1873).

[6]78 Ia. 703 (1889).

[7]130 Ia. 405 (1906).

[8]150 Ia. 511 (1911).

[9]44 Oh. St. 613, 10 N. E. 160 (1887).

manner.[9a] What the court evidently wished to impress was that the actions were not that kind of actions, but were adversary. They were what are technically termed actions *quasi in rem.*

The case of *Good* v. *Norley*[10] resulted in an affirmance because of a divided court. It was an action to quiet title, the plaintiff's title having been derived from an administrator's sale, *without any notice whatever.* It was argued that as the action by the administrator had been *in rem,* even if no notice was in fact given as required by statute, still the action of the court in assuming jurisdiction would give color of title upon which the action to quiet title could be based, and that the order of sale, although made without notice, could not be collaterally attacked in the suit to quiet title. To hold that the sale without notice was void, Beck, J., did give as a reason that the proceeding in probate was *in personam* rather than *in rem,* but the question of nonresidence of any one was not involved, not being presented by the record, and, therefore, the case cannot support the proposition contended for. The opinion gave a correct pronouncement that the case ought to be reversed but, it is submitted, upon faulty reasoning. Our court has consistently held, and this opinion merely holds, that, regardless of the kind of notice prescribed by the Legislature, some notice is necessary to give the court jurisdiction of either the parties or subject matter of the proceeding.

That the opinion of Judge Beck cannot be construed in support of Mr. Henry's position appears from the following extracts:

"The Code of 1851 provides that, in case the personal effects of an intestate are found inadequate to satisfy the debts allowed against his estate, a sufficient portion of the real estate may be sold for that purpose. The sale is ordered by the County Court, and the following sections point out the manner of conferring jurisdiction upon that court in such cases.

[9a] "A proceeding *in rem* is one to determine the state or condition of the thing itself. In a strict sense, it is a term applied to a proceeding taken directly against the property, having for its object the disposition of property without reference to the title of individual claimants; but in a true and more general sense a term applied to actions between parties where the direct object is to reach and dispose of property owned by them or of some interest therein. 22 Cyc. 1102. 'The object and purpose is to ascertain the right of every possible claimant, and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested, and notice of the proceedings is given to the whole world to appear and make claim for it.' *Woodruff* v. *Taylor,* 20 Vt. 75, 76." *Holcomb* v. *Kelly,* 114 N. Y. Supp. 1048, 1051 (1907).

[10] *Supra,* note 2.

'1343. Application for that purpose can be made only after a full statement of all claims against the estate, and after rendering a full account of the disposition made of the personal estate.' '1344. Before any order to that effect can be made, such notice as the court may prescribe must be given to all the persons interested in such estate.'

"The notice required by section 1344 was not given, as clearly appears by the record, and we are precluded from exercising the presumption that it was given. This question therefore arises: Did the application provided for by section 1343, without notice, give the court jurisdiction?"

"It is first argued by plaintiff's counsel that the notice required is not intended to give the court jurisdiction of the parties interested, because the notice provided for is not sufficient for that purpose, being only 'such notice as the court may prescribe.' The language here quoted from section 1344 may be construed to apply to either the substance of the notice, or the time and manner of its service, or both; whatever may be its precise meaning in this respect it is not important now to determine. The jurisdiction of the person of a party to a proceeding in court is acquired by process, original process, as it is called. The substance and form of the process must conform to statutory provisions. It may be a subpoena, summons or other writ attested by the judge or judges of the court, or by any officer thereof, or, as in our State, a notice signed by the plaintiff. The time and manner of its service may be by publication, or by copy left at the dwelling house of the defendant, etc., etc. If, in its wisdom, the legislature has left the form, substance, and time and manner of service of process under the control of the court out of which it issued, it certainly has that same character as though it were the creation of express statutory provisions. In short, the legislature has power to provide for process and prescribe its substance and the manner and time of service, or to clothe the courts with that power."[11]

In support of the foregoing the case of *Mason* v. *Messenger & May*,[12] a very instructive case, is cited.

It clearly appears from the quotation and the case cited in support thereof that this opinion cannot be relied upon to support the position of Mr. Henry. Indeed, it supports the very opposite view. And as this opinion is the foundation of his structure the building falls for want of a foundation.

In the case of *Washburn* v. *Carmichael*,[13] the court held that a guardian's sale of real estate *without notice* was void; a proposition no lawyer will question. The *dictum* of Judge Beck on the question as to whether the proceeding in the probate court to sell the property had been *in personam* or *in rem* had no place in solving the problem. The simple question before the court was: Should it hold a sale by the guardian ordered in a proceeding of which

[11] 28 Ia. l. c. 191, 192.
[12] 17 Ia. 261, 268 (1864).
[13] *Supra*, note 3.

the ward was not given notice, as required by statute, void for want of jurisdiction? It was held void for that reason.

In the case of *Boyles* v. *Boyles*,[14] Judge Beck states the propositions involved as follows:

"1. Did the court, in the absence of notice to the plaintiff (defendant in the probate case), required by the statute, acquire jurisdiction in the case? 2. Is the action barred under section 1356 of the Code of 1851, which provides that 'no action for the recovery of any real estate sold by an executor can be sustained by any person claiming under the deceased, unless brought within five years next after the sale.'"

The court held that the probate court had no jurisdiction to order the sale because there had been no notice, and that for that reason the sale under the order thus obtained was utterly void, and, therefore, no sale.

The case of *Lyon* v. *Vanatta*,[16] was an action brought to set aside a sale and deed made by plaintiff's guardian in 1867. The grounds of the case are stated to be: That the notice served on her as ward stated that said application would be made on the first Monday in January, 1867. No term of the county court could commence at that time on the first Monday in January, 1867 for the reason that a term of the district court commenced on said date. Such regular term of the county court was by law required to be held on the last Monday of December, 1866. A notice, therefore, requiring the minor to appear on the first Monday of January, 1867, would not be a good notice requiring her to appear on the last Monday of December preceding. The court held the notice given in the probate proceeding insufficient to give jurisdiction to make the order of sale. (Judge Beck dissented from his brethren.)

The method and kind of service was nowhere attacked in these cases. It was a question of no service at all.

The case of *Gregg* v. *Myatt*,[17] is brought in to support the conclusion reached. In the opinion of the writer, the citation is inapt. It was an action to set aside the probate of a will, an action specifically authorized by section 3296 of the Code. It was contended by the defense that, as the will had been admitted to probate after notice given as provided by Sec. 3284[18] of the Code, plaintiff's action was barred. Section 3296, Code 1897, provides:

---

[14] *Supra*, note 5.

[16] *Supra*, note 4.

[17] *Supra*, note 6.

[18] Code 1897, sec. 3284: "*Notice of Hearing.* The clerk shall give notice of the time fixed, by publishing a notice, signed by himself and addressed to all whom it may concern, in a daily or weekly newspaper printed in

"Wills, foreign and domestic, shall not be carried into effect until admitted to probate as herein provided, and such probate shall be conclusive as to the due execution thereof, until set aside by an original or appellate proceeding."

If the proceeding authorized by Sec. 3283[19] were conclusive then Sec. 3296 would have no place among our statutes. In this case the court held that the proceeding authorized by sections 3283 and 3284 constituted no bar to an action commenced under section 3296.

The case of *Dillavou* v. *Dillavou*,[20] it seems, undoes all the argument presented by Mr. Henry. As said, that was an action brought to construe a will and one of the defendants, being a nonresident, was served with notice by publication of the commencement of the suit. The court sustains the sufficiency of this service, saying:

"The course pointed out by the statute appears to have been followed with substantial fidelity, and to hold the notice ineffectual because of slight and immaterial omissions or discrepancies would establish an unfortunate precedent. But counsel further urge, with much earnestness, that an action brought for the construction of a will is not a proceeding in which service of notice by publication is allowable. Hence the publication in the instant case had no effect to bring John L. Dillavou into court, ... We do not so understand the statute. By Code, Section 3534, a notice by publication as against nonresident defendants is permitted in a variety of cases. Among them are enumerated actions for 'the recovery of real estate or an interest therein,' actions 'to establish or set aside a will,' and actions 'which relate to, or the subject of which is, real or personal property in this state when any defendant has, or claims to have, a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein.' It appears to us very clear that these provisions are broad enough to include actions like the one here presented."[21]

We next arrive at the case of *Raher* v. *Raher*,[22] which is a remarkable case. It is an action in equity to set aside a prior judg-

---

the county where the will is filed, for three consecutive weeks, the last publication of which shall be at least ten days before the time fixed for such hearing, and the court in its discretion may prescribe a different notice."

[19]Code 1897, sec. 3283: "After the will is produced, the clerk shall open and read the same, and a day shall be fixed by the court or clerk for proving it, which shall be during a term of court, and may be postponed from time to time in the discretion of the court. When the probate of a will is contested, either party to the contest shall be entitled to a jury trial thereon."

[20]*Supra*, note 7.

[21]130 Ia. l. c. 407.

[22]*Supra*, note 8.

ment at law of the same court adjudging the plaintiff to be of unsound mind. The law action, in which the defendant, John Raher, was adjudged to be of unsound mind, was commenced by the service on him of an original notice in the state of South Dakota. In the determination of the equity case on appeal the court states the very obvious fact that a proceeding against a person charging him with insanity and asking that a guardian be appointed for him is an action *in personam*, pure and simple. No question of property rights is involved.

"A court would have no jurisdiction of a purely personal action against a nonresident of the state, and could not appoint a guardian of the person of a non-resident."[23]

If the nonresident possesses no property in the state which is the subject of the controversy, then there is nothing upon which its tribunals can act. The state cannot reach beyond its boundary and lay its hand on any person in such foreign jurisdiction for any purpose affecting the personal status of the nonresident.[24] What the court actually held in this case was that it could not get jurisdiction of the *person* of John Raher by the service of notice in South Dakota.

To reach this conclusion it was not necessary for the court to hold the last clause of section 3800 of the Code unconstitutional. The court had long before held that "As personal service without the state only stands in place of notice by publication, no personal judgment can be rendered thereon."[25]

We have left the case of *Cross, Administrator* v. *Armstrong*.[26] If Mr. Henry's deduction is the proper one it presents a case of correct judgment based upon erroneous reasoning. In view of some matters appearing in the opinion of the court one is led to wonder what it would have said had the administrator wandered across the east boundary line of the State of Ohio into Pennsylvania and the court of that State had obtained service upon him in that state. It seems trite to cite authorities on the proposition that none other than the court which commissions him has any jurisdiction or control over him, and he has no rights, as such officer, in a foreign jurisdiction. See *Vaughan* v. *Northup*.[27]

---

[23] *Wallace* v. *Tinney*, 145 Ia. 478, 481 (1910).

[24] *Freeman* v. *Alderson*, 119 U. S. 185, 30 L. ed. 372 (1886).

[25] *Bates* v. *Chicago & N. W. R. Co.*, 19 Ia. 260 (1865); *Richardson* v. *Richardson*, 134 Ia. 242 (1907); *Lutz* v. *Kelly*, 47 Ia. 307 (1877).

[26] *Supra*, note 9.

[27] 15 Pet. (U. S.) 1, 10 L. ed. 639 (1841).

The Ohio court was clearly right in holding that the widow could not select a foreign forum and make the administrator follow her whithersoever she would. The Pennsylvania court could not render judgment against an administrator appointed by an Ohio court unless he voluntarily submitted himself to its jurisdiction. Nor could the Pennsylvania court get jurisdiction of a resident of Ohio, whether an administrator or not, by the method employed, to render a personal judgment against him. The Pennsylvania court having had no jurisdiction to determine the question, it undertook to say the widow took the money as trustee for the rightful owner or owners. She being a resident of Ohio, the state in which Cross was administrator of her husband's estate, the court of that State had full power to determine who was entitled to the money she had received from the insurance company in Philadelphia. The remedy sought by the widow in the Philadelphia court was strictly *in personam*. The Ohio statutes required suits against administrators, etc. to be brought in the court which appointed him. What the Ohio court held was that the Pennsylvania court could not bind an officer of the Ohio court by a judgment rendered against him personally on service by publication or its equivalent. No real estate situated in Pennsylvania was involved. The case has no bearing on the proposition of obtaining jurisdiction of nonresidents for the purpose of adjudicating property rights within the state. It is like the *Raher* case in this: that it holds that no personal judgment can be rendered on service by publication or its equivalent on nonresidents.

It will be observed from a most careful study of the cases cited by Mr. Henry that our court has nowhere held that nonresident defendants cannot be brought into court to determine questions of property unless served *personally within this state* with notice requiring them to defend the action; although that seems the very proposition he is contending for. It was unnecessary for the court, in each and every instance cited by him, to enter upon a discussion of the difference between suits *in rem* and suits *in personam*. The matter cited constitutes nothing but *dicta*.

It is said in Cyc.:

"It may be said as a general rule that where suit is brought to determine a nonresident's personal rights and obligations, that is, where it is purely *in personam*, service by publication is ineffectual for any purpose, since no personal judgment can be rendered in such case; but service by publication, when authorized by statute, is effectual so far as the proceeding is *in rem* or *quasi in rem*, and gives the court jurisdiction over property

within its jurisdiction. In proceedings *quasi in rem* the court usually acquires jurisdiction by attaching the property of the defendant, whereas in proceedings strictly *in rem* no seizure of the property is necessary for jurisdictional purposes.'"[28]

It should not be overlooked that Judge Beck in the first part of his opinion in *Good* v. *Norley*[29] says that the legislature has the undoubted power to prescribe the notice or authorize the court to do so and that when followed that procedure gives jurisdiction to determine rights of property. But if it now proves to be a fact that under our law all nonresidents interested in real estate in this state must be served personally with notice in this state informing them of the commencement of the proceeding before their interests can be adjudicated, then we are, indeed, of all peoples the most helpless.

In Pomeroy's Equity Jurisprudence,[30] it is said:

"Equity decrees ordinarily act only *in personam*, and can therefore, in general, have effect only as against parties duly served with process within the territorial jurisdiction of the court. It is competent, however, for a state to provide methods for the determination of title to land within its borders, and in the exercise of such power, it may give equity decrees relating to or affecting the title to land, the effect of judgments *in rem*, which, therefore, may be based upon service of process by publication. 'It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem*, in the broader sense which we have mentioned.' *Pennoyer* v. *Neff*, 95 U. S. 714; 24 L. ed. 565. *Freeman* v. *Alderson*, 30 L. ed. 272. *Banco Minero* v. *Ross & Masterson*, (Tex. Civ. App.) 138 S. W. 224. . . . . .

"As a result of statute, it is held in many states that a decree removing a cloud from, or quieting title to, land within the jurisdiction may be based upon publication of summons. Likewise, a decree for specific performance, acting upon the land itself, may issue upon such service. Proceedings for the partition of real estate, the foreclosure of mortgages and the enforcement of liens upon land within the state, are also within this class. In all of these cases the title is directly affected by the decree."

It has been repeatedly held by the federal courts that the state's power to provide by statutes for the adjudication of titles to real

[28] 32 Cyc. 471.

[29] *Supra*, note 2.

[30] Vol. 4, sec. 1436.

estate within its limits as against nonresidents who are brought into court by publication is unquestioned. Our Supreme Court in *Knudson* v. *Litchfield*,[31] approves the holding of the supreme court of the United States in *Arndt* v. *Griggs*.[32] Our court in the *Knudson* case says that the contention there raised that notice by publication in an action to quiet title against a nonresident does not constitute due process of law, is completely answered by the late case decided by the Supreme Court of the United States, wherein it is held that service by publication in such cases is good. The opinion then cites *Arndt* v. *Griggs*,[32] in which case the United States Supreme Court said:

"The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but is, what jurisdiction has a state over titles to real estate within its own limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts for any purpose by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within the limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."[33]

In the case of *Bennett* v. *Fenton*,[34] the court spoke by Judge Shiras.[35] The syllabus reads as follows:

"An action to determine an adverse claim to real estate is so far a suit *in rem* that a decree can be sustained so far as it deals with the title to land, where it is authorized by legislation of the State, although the defendant was a nonresident, was served only by publication of summons and did not appear."

As Mr. Henry especially stresses the position that titles of nonresident minors in Iowa real estate cannot be divested by the procedure authorized by the Legislature of the state for its courts,

[31] 87 Ia. 111 (1893), l. c. 121.
[32] 134 U. S. 316, 33 L. ed. 918 (1890).
[33] 134 U. S. at p. 320.
[34] 41 Fed. 283, 10 L. R. A. 500 (1890).
[35] The former judge of the Northern District of Iowa.

attention is here called to the case of *Bryan* v. *Kennett*.[36] In that case the court says:

"Its (the court's) jurisdiction to pass any final decree affecting the rights of nonresident minors is assailed only upon grounds now to be stated. 1. It is contended that there was no authority, under the laws of Missouri, to proceed against the nonresident minors by publication. Counsel for the plaintiffs refers to the Act of March 17, 1835, regulating the practice of law in the courts of Missouri, and calls attention to the fact that, while it provides for actual service of process upon infants, no provision is made for service upon nonresident defendants by publication. And referring to the act of March 7, 1835, regulating the practice in chancery, he insists that, while the mode is therein prescribed for service of process upon nonresident defendants, no provision is made for service on nonresident minors. It is not questioned that, under the laws of Missouri, adult nonresident defendants in equity suits concerning real estate, may be proceeded against by publication in such cases as that instituted by Deane in 1836; but it is contended that nonresident infants could not be brought before the court in that mode. In this view we do not concur. It appears from the Missouri statutes, that the court which determined Deane's suit was a court of record, having conclusive original jurisdiction, in the county in which it was held, as a court of equity, 'in all cases where adequate relief cannot be had by the ordinary course of proceedings at common law,' with authority 'to proceed therein according to the rules, usage and practice of courts of equity, and to enforce their decrees by execution, or in any manner proper for a court of chancery'; also that 'suits in equity concerning real estate, or whereby the same may be effected, shall be brought in the county within which such real estate, or the greater part thereof, is situate,' and, in any county, 'if all the defendants are nonresidents'; and further, that 'in all cases where the court may decree the conveyance of real estate, or the delivery of personal property, they may, by decree, pass the title of such property without any act to be done on the part of the defendants, when in their judgment it shall be proper; and may issue a writ of possession, if necessary, to put the party entitled into possession of such real or personal property, or may proceed by attachment or sequestration.'

"By the same statute, provision is made for proceeding against defendants who are nonresidents of the state, by publication, where the complainant or any one for him files with his bill an affidavit stating their nonresidence. Upon such affidavit being filed, the court or clerk, in vacation, was authorized to make an order, directed to such nonresidents, notifying them of the commencement of the suit, stating the substance of the allegations and prayer of the bill, and requiring them to appear on a day to be therein named and answer the same, or the bill be taken as confessed. Similar proceedings were prescribed as to persons interested in the subject matter of the bill, whose names appeared, from the verified allegations of the bill, to be unknown to the complainant. While our attention has not been called to any statute of Missouri, in force when Deane's suit was instituted, which in terms authorized publication against nonresi-

[36] 113 U. S. 179, 28 L. ed. 908 (1885).

dent minors, there was no exception in their favor from the provision which permits that mode of bringing nonresident defendants before the court. They could be proceeded against by publication whenever the statute permitted such process against adults."

"We have, then, a final decree of a court of superior general jurisdiction, rendered in a suit that involved the title to a tract of land embracing the premises in controversy and situate in the county in which the court was held; in which suit the present plaintiffs, as nonresident minors, were parties defendant, having been brought, in the mode prescribed by the local law, before the court, by publication, and having made defense by guardian *ad litem* duly appointed, and by which decree it was adjudged that the right, title and interest of the present plaintiffs and others in said tract be vested in the complainant, Deane, under whom the present defendants hold possession. The decree, as we have seen, passed the title without any conveyance from the nonresident defendants, for, by its terms, whatever title they held was vested in the complainant, Deane. According to the settled principles of law the plaintiffs are thereby estopped from asserting, in this collateral proceeding, any interest in the premises in controversy adverse to that of the defendants. . . . . It (the former judgment) was and is conclusive as to all the parties to that suit and their privies until reversed or modified on appeal, or unless, in proper time, it had been impeached, in some direct proceeding, and set aside or annulled."

The case of *Huston* v. *Huston*,[37] involved the question of a sale of real estate by an executor. One of the defendants being a nonresident, was served by publication of the notice as prescribed by the court, the statute then directing "such notice as the court may prescribe must be given to all persons interested in such real estate." The question decided was whether the nonresident served by publication could petition the court for a retrial of the case the same as though the action were by general proceeding. And the court held that he could. (The opinion is by Cole, Judge, who concurred with Judge Beck in the *Good-Norley* case.)

A very instructive case is that of *Wallace* v. *Tinney*.[38] It was an action by a citizen of Iowa against a nonresident defendant who was a person of unsound mind, as appears from the opinion. Notice on her was had by publication. In the case, as appears from the opinion, she was represented by a guardian of the property, appointed by the Iowa court. The court, among other matters, says:

"The principal contention made for plaintiff and appellant is that the order for the appointment is void for the reason that the ward, Margaret, was not given notice of the application; that she was a resident of a foreign country over whom the court had no jurisdiction; that the hearing was

[37] 29 Ia. 347 (1870).

[38] *Supra*, note 23.

ex parte; and that there was no finding of facts sufficient to justify the appointment. Our statute provides: 'A guardian may be appointed for a nonresident minor, idiot, lunatic, or person of unsound mind, who has property in this state, on application to the district court or judge of the county in which the property, or any part thereof, may be, who shall qualify in the manner, have the same powers, and subject to the same rules as guardians of resident minors.' It is insisted that the status of the party must first be fixed by judicial decree. This is a strained construction of the statute. Of course, the fact of incompetency must be established; but in our opinion this may be done under the application for the appointment, and need not precede the application. This view is confirmed by reference to Section 225 of the Code, which reads as follows: 'The district court of each county has original and exclusive jurisdiction . . . . to appoint guardians of the property of all persons, nonresidents of, or who have property within the county, subject to guardianship, or whose property is afterwards brought into the county.' A court would have no jurisdiction of a purely personal action against a nonresident of the state, and could not appoint a guardian of the person of a nonresident. If the appellant's contention were correct—that no appointment may be made of a guardian of the property of a nonresident, and that there should first be a judicial determination of the fact of insanity in an independent suit—this would, in effect, deprive a probate court of its power to protect the property of a nonresident laboring under disability. It will be observed that the appointment here was of the property and not of the person, and it follows that the trial court must have held that Mrs. Wallace was a person of unsound mind or a lunatic.'"[39]

In *Raher* v. *Raher*[40] the district court of Iowa County had appointed a guardian of the *person* of the defendant Raher, which judgment was set aside by the supreme court because the original notice thereof had been served on him in South Dakota. In the case of *Wallace* v. *Tinney*,[41] the district court had appointed a guardian of the *property* of a nonresident on service of notice by publication, and the appointment is upheld by the supreme court.

In the case of *Pursley* v. *Hayes*,[42] the court says, speaking by Judge Wright,

"The great error into which counsel fall, is in failing to recognize the distinction between *defective service* and *no service*. If, in this case, there had been no service, what has already been said unmistakably indicates . . . . that this sale would be held void."

Said the court by Beck, J., in *Rankin* v. *Miller*,[43]

"In the absence of proof of notice or a finding of the court that notice had been given, the proceedings are void. It is not a case of insufficient or

[39] 145 Ia. 478, l. c. 480, 481, 482.

[40] *Supra*, note 8.

[41] *Supra*, note 23.

[42] 22 Ia. 11, l. c. 38 (1867).

[43] 43 Ia. 11, l. c. 21 (1876).

defective notice, as in *Shawhan* v. *Loffer*, 24 Iowa 217, and other decisions of this court, but one in which there is no pretense of notice as required by law."

In the case of *Valley Natl. Bank* v. *Crosby*,[44] the court says:

"But we have held notice of application for the sale of land essential to the validity of the proceeding. . . . . The evident reason for this is that property, the title of which is in the heirs, may not be taken from them without opportunity of being heard."

In the case of *Mullin* v. *White*,[45] the court says:

"It was determined by this court in *Good* v. *Norley*, that a proceeding to sell real estate for the payment of debts is not *in rem* but adversary; and, if this be true, it must follow that jurisdiction of the person cannot be acquired without some form of notice," etc.

In the case of *Mullinix* v. *Brown*,[46] which was a proceeding by an administrator to sell real estate, the court says:

"Section 3324 of the Code provides: 'Before an order to that effect can be made, all persons interested in such real estate shall be served with notice in the same manner as is prescribed for the commencement of civil actions, unless a different one is prescribed by the court or judge.' This section gave either the court or the judge power to prescribe the notice which may be given of such applications as are here involved. Such an order was made in this case and compliance therewith was had by the administrator. The most that can be said regarding this matter is that the notice was defective or insufficient. It is not a case of no notice, but of defective notice. . . . ."

Based upon the foregoing the writer contends that the Iowa court has nowhere held that proceedings to determine the title to real estate cannot be brought against nonresident minors, persons under other disability, or adults, by publication of notice, or by personal service on nonresidents outside the state. Further, if Mr. Henry's contention, that proceedings by administrators and guardians for the sale of real estate of nonresidents are strictly actions *in personam* were sound, then it is submitted that no amount of legislation of this state can change our helpless situation in this respect, as the state is powerless to bring the persons of nonresidents in for the purpose of rendering strictly personal judgments against them.

The writer believes that the cases cited establish the fact that Chapter 263 of the Acts of the 39th General Assembly[47] is ample to

---

[44]108 Ia. 651, l. c. 657 (1899).

[45]134 Ia. 681, at p. 685 (1907).

[46]151 Ia. 468, at p. 472 (1911).

[47]Laws, Iowa, 1921, p. 292; sec. 1 of this act adds to sec. 3534, Code Supp. 1913 (Code, 1919, sec. 7179) prescribing the cases in which notice by publication may be resorted to, the following subsection: "11. In

give the court jurisdiction in all cases therein contemplated. As the Legislature would have had ample power and right in the first instance to prescribe the notices legalized by Chapter 88 of the Acts of the 39th General Assembly,[48] therefore, said act cures any and every defect in notice that may have existed in the cases contemplated.

The final clause of Sec. 3324 of the Code,[49] which Mr. Henry deems to be unconstitutional was applied by the court in the case of *Mullinix* v. *Brown*,[50] and approved by the supreme court; which would show that the court did not deem it to be unconstitutional.[51]

Newton, Iowa. HENRY SILWOLD.

---

actions or proceedings by an executor, administrator or guardian to sell or mortgage the real property belonging to the estate of a decedent, or to a ward, as the case may be." Sec. 2 amends sec. 3207, Code 1897 (Code 1919, sec. 6652) prescribing personal service on the minor of application by a guardian for the sale of the minor's real estate, by prescribing that a copy of the application "must be served on the ward in the time and manner prescribed for the service of an original notice in ordinary actions, unless a different service is ordered by the court or judge."

[48]Laws, Iowa, 1921, p. 80 (Chap. 88): "Section 1. *Decrees Legalized.* That in all cases where decrees and orders of court have been obtained for the sale of real estate by a guardian prior to January 1, 1921, where the original notice shows that service of notice pertaining to the sale of such real estate was made on the minor or ward outside of the state of Iowa, such services of notices are hereby legalized; and that all decrees obtained as aforesaid are hereby legalized and held to have the same force and effect as though the service of such original notice had been made on the minor or ward within the state of Iowa."

[49]Code 1897, sec. 3324: "Before any order to that effect can be made, all persons interested in such real estate shall be served with notice in the same manner as is prescribed for the commencement of civil actions, unless a different one is prescribed by the court or judge." This section is now superseded by Laws 1921, Chap. 263, sec. 3, which reads: "Before any order to that effect shall be made, all persons interested shall be served with notice of the filing of said application and of the time and place of hearing thereon. Said notice shall be given in the time and manner prescribed for the service of an original notice in ordinary civil actions, unless a different service is ordered by the court or judge."

[50]*Supra*, note 46.

[51]Since the foregoing article was written, the following discussions of the same or kindred topics have appeared in recent numbers of legal periodicals: "Service as a Requirement of Due Process in Actions *in Personam*" by Charles K. Burdick (Cornell University) 20 Michigan Law Review 422 (February, 1922); "Service by Publication upon Non-Resident Defendants in Actions *in Rem*," 22 Columbia Law Review 152, note (February, 1922); "Service by Publication in Suit Involving Equitable Assignment of Insurance Policy," 31 Yale Law Journal 425, note (February, 1922).—ED.

INELIGIBILITY OF A UNITED STATES SENATOR OR REPRESENTATIVE TO OTHER FEDERAL OFFICES.

During a term for which a person has been elected to the United States Senate or House of Representatives is he ineligible to appointment to a federal civil office which was created or the salary of which was increased by an Act of Congress passed during an immediately preceding term or any prior term for which this person had been elected?

The only rule of law applicable to the case is the second paragraph of Section 6, Article I of the Constitution of the United States, as follows:

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

Senators and Representatives are subject to the same rules in this respect; hereafter for the sake of brevity one only need be mentioned.

It is obvious that Senators are eligible to some Federal offices and not to others. The second clause of the above paragraph, beginning "and no Person" is irrelevant to the present issue. It provides in effect that if a Senator accepts an office *to which he is eligible* he thereby vacates his seat in the senate, and *vice versa* one who is holding a federal office at the time of his election to the senate cannot continue in that office if he accepts a seat in the senate.

The present question turns upon the first part of the above paragraph of the constitution. The natural reading of that provision is, that during a term in the senate a senator is ineligible to appointment only to such Federal offices as have been created or the emoluments of which have been increased during *that* term. Not only is this the natural reading but critical analysis of the language, far from casting doubt upon this as its meaning, positively excludes any other interpretation. It is a well settled rule of construction that *in the absence of doubt or ambiguity* the language of a statute or constitutional provision must be given its natural import and it is not permissible to resort to its legislative history, that is, to the proceedings of the bodies that drafted and enacted or adopted it, to show that the language was intended not to have its natural import. Even in case of ambiguity though resort may

be made to the *proceedings of the bodies* in which it was framed and adopted, it is to those phases of the proceedings which indicate the understanding upon which a body as a whole acted, such as amendments accepted or rejected by the body; the remarks of individual members[1] expressing their personal views are of the slightest value, though made in the debates on the proposed measure. Much less are remarks made by members outside the assembly or after its close to be considered.

The only doubt that has ever been cast upon the natural reading above stated has been by expressions of individual opinion. The only expressions having even this slightest of value made by persons who were members of the Constitutional Convention of 1787 were not made by them in the convention. Luther Martin in his address to the Maryland legislature, which was not authorized to accept or reject the constitution, said:

"'Tho' a senator cannot be appointed to an office created by himself, he may to any that has antecedently been established.'"[2]

Similarly in his public letter, called "Genuine Information" he said:

"They cannot be appointed to offices created by themselves or the emoluments of which are by themselves increased.'"[3]

It may be noted that Martin stated that he had left Philadelphia before the present provision of the constitution was adopted.[4] In a newspaper statement in 1788, Roger Sherman said:

"no member is eligible to any office that shall have been instituted or the emoluments increased while he was a member.'"[5]

James Madison in the Virginia ratifying convention said in a compendious explanation of this provision:

"They can fill no new offices created by themselves nor old ones of which they increased the salaries.'"[6]

It is to be noted that these expressions are loose and general, the makers not having under consideration any specific case calling

[1] See *Maxwell* v. *Dow*, 176 U. S. 581, 601; *Downes* v. *Bidwell*, 182 U. S. 244, 254; *Legal Tender Case*, 110 U. S. 421, 443.

[2] 3 FARRAND, 151, 155. Throughout the notes a reference to "Farrand" means FARRAND'S RECORDS OF THE FEDERAL CONVENTION. In later notes I have frequently indicated more specifically that a particular reference is to the official journal of the convention, or to Madison's notes of the speeches, or to Yates' notes, all of which are printed in Farrand's collection.

[3] 3 FARRAND, 172, 201.

[4] 3 FARRAND, 201.

[5] 3 FARRAND, 354-355.

[6] 3 FARRAND, 316.

for discrimination or accuracy of expression. One obvious looseness in Martin's and Madison's statements is the expression, "created by themselves." It is obvious that the constitution makes it irrelevant whether the member voted for or against the creation or increase. It is sufficient that the legislation occurred during "such time." If a person has served for a half a dozen terms in the senate and while now in the senate is proposed for appointment to a federal office, is he ineligible because during his first term, it may be more than thirty years ago, Congress created that office or increased the salary of it? The loose statements just quoted can be read as answering, yes. How the authors would have recast their expressions if the specific problem had been put to them is matter for conjecture.

ANALYSIS OF THE LANGUAGE OF THE CONSTITUTION.

"No Senator or Representative shall, *during the Time for which he was elected*, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased *during such time.*"

In subjecting this provision to analysis three points obtrude: (1) the persons disqualified (2) the duration of the disqualification (3) the offices from which they are barred. The first is simple from the negative point of view, that is, no officers in the government are disqualified for appointment to other offices except Senators and Representatives. It seems that the Vice President is eligible during his term to any other office notwithstanding his casting vote as *ex officio* presiding officer of the Senate might have been necessary to create, or increase the salary of, the office.

Points (*1*) and (*2*) must be considered together. A Senator has the prescribed disqualification not merely while he is occupying his seat, but even though he has resigned he remains disqualified during the remainder of the term. But it is only during his term that he is disqualified. If an office is created the last day of his term he is eligible to it the next day, this is beyond cavil, if he has not been re-elected to the next term. That next day he is not a Senator, nor is that next day "during the time for which he was elected." *The phrase just quoted describes the duration of the disqualification.* It clearly includes only the *present* term. Suppose a candidate is interrogated. All will concede that it is irrelevant, on this aspect of the problem, to ask, Were you once a Senator? If asked, Are you now a Senator, and the answer is, no, that is not conclusive. The accurate question is, Were you elected to a still unexpired term in the senate?

Point *(3)*. Offices from which a senator is barred during his term:

(a) barred only from civil not military offices,
(b) from appointive not elective offices,
(c) from federal not state offices,
(d) not from *all* federal, civil, appointive offices, but only from those as to which there has been a particular kind of federal legislation "during such time."

The phrase *during such time* is here a part of the description of the offices that are closed. Does "*such* time" include a prior completed term? "Such" relates back to a previously stated time. The only previously stated time is the period or duration of the disqualification. It refers back to the expression "during the time for which he was elected." This phrase as a definition of the duration of the disqualification can have no sense except as it includes the moment the appointment is made, and therefore refers to a term still current when the appointment is made.

Since the phrase "during the time for which he was elected" means the term current when the appointment is made, "during *such* time" means the same term.

Suppose a senator now in a second term is proposed for an office the salary of which was increased in the last days of his first term after the November election at which he was elected to succeed himself. The time *of* election is immaterial. The time the constitution speaks of is the "time *for which* he was elected." Though Senators are elected in November the time for which they are elected is the six-year period beginning the fourth of the following March. If a Senator is succeeding himself, the time between the November election and the fourth of March following is a part of the time for which he was previously elected. It is not a part of his present term.

Since a Senator cannot free himself from disqualification during his term, by resignation, the language of the constitution contemplates that the appointing officer shall look back from the moment of a proposed appointment to see whether it is within an unexpired six year period for which his prospective appointee was elected to the Senate. If not, that is, if the candidate has been a Senator and his term has expired, he is eligible to any office, even to one created the day before the term expired. On the other hand, if the moment of appointment is within an unexpired six year period for which his proposed appointee was elected to the

senate, he must look through the legislation of Congress to see whether the office in question was created or the emoluments thereof increased during such time.

The opposing construction leads inevitably, inescapably to an extreme that it seems no one could have intended. If "during such time" includes an immediately preceding term it must include *any* other term however remote. If thirty years ago the salary of an office was increased, a man who was then a member, if now again a member, would, on that construction, be ineligible during his present term even though he had been in private life throughout the interval. What a deterrent to needed readjustment of salaries! Moreover the opposing construction in effect makes the concluding phrase read, "during such time" *or times,* whereas the word "time," back to which "such" refers, cannot in its collocation as defining the period in which the appointment is not to be made, naturally or sensibly be read in the plural.

If it were reasonable to concede that the language is ambiguous, there is a settled principle of construction that would require acceptance of the interpretation more favorable to the appointee. All disqualifications or ineligibilities to office in a democratic society with a republican form of government are against common right. Restrictions upon common right are construed in favor of the persons denied.[7] In the Virginia ratifying convention Madison said of this paragraph of the Constitution:

"It gives them [Senators and Representatives] an opportunity of enjoying existing offices which they may be capable of executing. To have precluded them from this would have been to exclude them from a common privilege to which every citizen is entitled, and to prevent those who have served their country with the greatest fidelity and ability from being on a par with their fellow citizens."

The underlying motive of the framers of the Constitution was to take away some of the opportunities for intrigue and corruption. Against this they were constantly weighing the undesirability of shutting out any able men from being taken into consideration in filling an office, and also some thought that disqualifications of Senators and Representatives for appointment to other offices would disincline some of the ablest from serving in Congress. The subject was given rather extensive discussion in the Constitutional Convention. Various proposals were considered. At one stage a majority of the delegations approved a very severe disqualification,

[7]Decisions to this effect are collected in SUTHERLAND, STATUTORY CONSTRUCTION, Sec. 366, and in 36 CYC. 1178.

that a member during his term was to be ineligible to any federal office whatsoever, without regard to when it was created, and Senators were to be ineligible for the space of one year after their terms expired.[8] The countervailing motives finally prevailed to establish the limited ineligibility now prescribed in the Constitution. It is irrelevant to consider the weight of the motives *pro* and *con*. The language of the Constitution controls.

If in spite of the force of the above considerations the language of the Constitution should be considered sufficiently doubtful to admit resort to the proceedings of the Constitutional Convention, these proceedings will now be faithfully described.

Proceedings of the Convention.

On June 13 the "Report of the Committee of Whole on Mr. Randolph's propositions was made to the Convention." The third and fourth resolutions of this report dealt among other matters with ineligibility to other offices of members of the "first branch" of the "national legislature," and of the "second branch," respectively. The ineligibilities of members of the two branches were identical and the language was identical in the two resolutions. This is mentioned because later on in the proceedings these were considered separately and different ineligibilities tentatively adopted; still later on they were made identical in substance, and finally consolidated into one paragraph of the Constitution. The pertinent parts of the third and fourth resolutions read as follows:

"to be ineligible to any office established by a particular State, or under the authority of the United States, (except those peculiarly belonging to the functions of the first [second, in Resolution 4] branch), during the term of service, and under the national Government for the space of one year after its expiration."[9]

The debate in the convention reached the above part of resolution 3 on June 22.[10] The resolution as it stands above is loosely constructed and ambiguous. Did this resolution mean to make a member "during the term of service" ineligible to any office whatsoever, and for one year after the term, or is the phrase "during the term of service" to be carried back to the word "established," and confine the ineligibility only to offices established during the term of service? The latter construction would throw the succeeding phrase "and for . . . . one year after . . . ." into a dubious

[9] These and other proposals made in the Constitutional Convention are fully discussed in the last part of this essay.

[8] 1 Farrand, 228 (Journal); 235 (Madison).

[10] 1 Farrand, 375 (Madison); 379 (Yates); 383 (Journal).

position. It seems improbable that it was intended to make a member ineligible to an office established within a year after he ceased to be a member. It seems more probable that the expression "office established by a particular State or under the authority of the United States" meant merely any State or national office whether created before or during the candidate's membership of the national legislature; that the ineligibility of a member was to exist while he was a member and for one year more, while the offices to which the ineligibility extended was to be all offices, state or national.

It is not important to settle upon an interpretation, since this resolution of the committee of the whole was much modified by the convention as soon as it reached this part of the report.

On June 22, according to Madison[11] Gorham moved to strike out the whole provision for ineligibility, and this motion was lost on an equally divided vote. According to Yates,[12] Gorham's motion was only to strike the words "and under the national government for the space of one year after its expiration." Madison's minutes of the remarks of members corroborate his own statement as to what Gorham's resolution was; Yate's minutes corroborate his own statement. The official journal[13] agrees with Yates, and records that the motion was lost by an equally divided vote.

On June 23, the words "by a particular State" were stricken out by a vote of 8 to 3.[14] Madison moved to strike out all that remained after the word "established" and insert in lieu thereof:

"or the emoluments whereof shall have been augmented by the Legislature of the United States during the time of their being members thereof, and until they shall have ceased to be members for the space of one year."

This motion was lost on a vote of 2 to 8.[15] The above is the journal record of Madison's resolution; Madison himself records it as follows:

"ineligible during their term of service, & for one year after—to such offices only as should be established, or the emoluments thereof, augmented by the Legislature of the United States during the time of their being members."[15a]

It is to be carefully noted that neither the resolution reported by the Committee of the Whole on June 13, nor Madison's lost amend-

[11] 1 FARRAND, 375, 377 (Madison).
[12] 1 FARRAND, 379 (Yates).
[13] 1 FARRAND, 370 (Journal).
[14] 1 FARRAND, 383 (Journal).
[15] 1 FARRAND, 383 (Journal), 394 (Yates); top of page 390, (Madison).
[15a] 1 FARRAND, 386 (Madison).

ment uses the words now in the Constitution, viz., "during the time for which he was elected." The committee's report says: "during the term of service;" Madison's resolution uses: "during the time of their being members." Madison's phrase could more reasonably than the others be read as covering offices established or the emoluments thereof augmented either in the present term of the candidate or in any preceding term of the candidate. Madison had said the day before "I am . . . . of opinion, that no office ought to be open to a member, which may be created or augmented *while he is in the legislature.*"[17]

It is doubtful whether this refinement was in his mind; certainly it was not made a point of comment by other members, the debate turning upon the broader question, whether members should be ineligible to every national office or only to those created or augmented within a stated time. Madison said that he had been led to his motion "as a middle ground between eligibility in all cases, and an absolute disqualification" during membership. The latter view prevailed with the convention (for the time) and after the defeat of Madison's proposal a resolution was adopted to strike out the word "established."[18]

After this swing toward severity as to the offices that were to be closed to members, the convention relaxed as to the duration of the period of ineligibility by striking off the phrase, "and for the space of one year after . . . ." There were also some changes in phraseology not pertinent to the present inquiry.

The above proceedings related to ineligibility of members of the first branch of Congress. On June 26, the convention reached resolution 4 of the Committee of the Whole, which related to ineligibility to office of the members of the second branch. On that day the following was adopted as a substitute for this part of resolution 4:

"to be ineligible to, and incapable of holding any office under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term for which they are elected, and for one year thereafter."[19]

No debate is reported. Obviously the ground had been covered in the debate on ineligibility of the members of the first branch and this substitute adopted the provision arrived at for members of the first branch in the proceedings above set out, with the single dif-

[17] 1 FARRAND, 380 (Yates). Italics are the present writer's.

[18] 1 FARRAND, 384 (Journal), 390 (Madison).

[19] 1 FARRAND, 419 (Journal).

ference that members of the second branch were to be ineligible for a year after the term expired.

Thus the rule of absolute disqualification was temporarily adopted. No member could step from his seat in either house into any national office. Members of the second branch must even wait a year after their terms expired.

These provisions for ineligibility of members of the two houses, alike *mutatis mutandis* except for the one-year-after rule, went in this form[20] to the Committee on Detail, which was provided for on July 23. This Committee was composed of Rutledge, Randolph, Gorham, Ellsworth and Wilson.[21]

On August 6 this committee brought in its report. The ineligibility provisions had been consolidated by the committee into Article VI, Section 9 which read as follows:

"The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected: and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards."[22]

Why was the word "time" substituted by the Committee on Detail, for the word "term" in this provision as it had been submitted to them? It may be significant that in the papers that have survived showing different stages of the work of this committee the word "term" is used in all the documents in which the eligibilities of the members of the two branches are treated in *separate* provisions, and the word "time" appears in the first document in which the two provisions are consolidated into one.[23] The phrase "during the term for which they are elected" would fit either separately; but the "terms" of the upper and lower houses were to be different; the more general word "time" fitted both.

The report of the committee of detail was taken up section by section. On August 14, Article VI, Section 9 was reached. A motion was offered, as a substitute, to make members eligible to any office with the provision that acceptance of another office would vacate the member's seat; that is, a rule merely of incompatibility to hold two offices simultaneously. An earnest debate ensued in which several members expressed opposition to Article VI, Sec-

[20] 2 FARRAND, 129.

[21] 2 FARRAND, 97 (Journal).

[22] 2 FARRAND, 180.

[23] See the documents in 2 FARRAND, 140, 141-2, 155, 166.

tion 9, and the substitute failed only by an equally divided vote.[24]

One of the principal contentions was that meritorious men would be discouraged from devoting themselves to legislative service, if during such service they were ineligible to every national office. The idea was advanced that membership in the legislature would by some able men be regarded only as an opportunity to demonstrate their fitness for other offices.[25]

Further consideration of Article VI Sec. 9 was postponed until after the powers of the senate should be determined. On Aug. 31 this with other postponed parts of the report was referred to a "committee of eleven," one from each state then represented in the convention. On September 1, this committee made a report in part as follows:

"That in lieu of the 9th section of the sixth article the following be inserted: 'The members of each House shall be ineligible to any civil[26] office under the authority of the United States during the time for which they shall respectively be elected.' "[27]

On September 3, a final discussion occurred, and the changes made that day are significant.

Mr. Pinkney again moved to substitute a mere rule of incompatibility for the above report of the committee. The motion was lost.[28]

Mr. King moved to insert the word "created" before the word "during." This was a revival of Madison's earlier proposal to make members ineligible only to particular offices, not to all, but only to those "created during the time for which they shall respectively be elected." The old arguments *pro* and *con* were repeated and King's motion was lost by an equally divided vote, 5 to 5.

Immediately Mr. Williamson moved to insert before the word "during," the words: "created or the emoluments whereof shall have been increased."

The motion was put, apparently without debate, and carried, Ayes—5; noes—4; divided 1. So even had been the contest that

---

[24] 2 FARRAND, 282 (Journal), 283-289 (Madison).

[25] 2 FARRAND, *passim* 283-289 (Madison).

[26] In the last debate before this matter was referred to the committee of eleven Gouverneur Morris "put the case of a war, and the citizen the most capable of conducting it, happening to be a member of the Legislature." Randolph, one of the advocates of severe disqualification, admitted that military and naval offices ought to be excepted. It seems that the committee of eleven took this hint and inserted the word "civil."

[27] 2 FARRAND, 483 (Journal), 484 (Madison).

[28] 2 FARRAND, 486-487 (Journal), 489 (Madison).

the addition made by Williamson to King's motion divided one delegation.[29]

Note the peculiar effect which this hasty insertion of these words before the word "during" had upon the force of the phrase "during the time" etc. In the committee's report this phrase qualified or expressed the period within which a member was to be ineligible. The same phrase in the provision as amended serves only as a part of the description of the particular offices to which an ineligibility would extend. The convention had hastily adopted a provision which might easily be read as signifying that any person who was a member would *throughout his life, whether in or out of Congress,* be ineligible to an office which had been created or the emoluments of which had been increased during his term. The provision as amended read as follows:

"The members of each House shall be ineligible to any civil office under the authority of the United States *created or the emoluments whereof shall have been increased* during the time for which they shall respectively be elected."

In this form the provision was referred to the "Committee on Style."[30] This committee evidently caught the point just referred to and reported the provision in this form:

"No senator or representative shall, *during the time for which he was elected,* be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been encreased during such time."[31]

They saw that the phrase "during the time" had to be used both to define the time of disqualification and also as part of the description of the offices to which appointment could not be made. Evidently they knew what the convention intended. The convention accepted this phraseology without objection and it so stands in the constitution.

There is nothing in the proceedings of the convention to lend any color whatever to the contention that "the time for which he was elected" or "such time" meant the plural, the "times." Madison's proposed phrase "during the time of their being members" with some plausibility might have been so interpreted, but it was rejected. The only plausible suggestion as to the use of "time" instead of term is that it was a more suitable word to express terms of different length.

D. O. McGovney.

[29] 2 Farrand, 487 (Journal), 490-492 (Madison).

[30] 2 Farrand, 565, 568.

[31] 2 Farrand, 593.

Iowa Law Bulletin

Published four times a year by the faculty and students of the College of Law of the State University of Iowa. Issued January, March, May and November.

NOTES

THE WASHINGTON CONFERENCE ON ADMISSION TO THE BAR.—The National Conference of Bar Associations, an organization created in 1915 as the result of action taken by the American Bar Association, met in Washington on February 23 and 24 to discuss the recent recommendations of the American Bar Association as to standards for admission to the bar. The Conference was made up of five delegates from the American Bar Association, three delegates from each state bar association, and two delegates from each local bar association. The meeting was well attended. Forty-four state bar associations, more than one hundred local bar associations, and two Canadian Bar Associations, were represented.

A full account of the proceedings will be given in the May number of the BULLETIN. The resolutions of the Conference, which were adopted at the final session by an overwhelming vote, follow:

RESOLVED; That the National Conference of Bar Associations adopts the following statement in regard to legal education:

1. The great complexity of modern legal regulations requires for the proper performance of legal services lawyers of broad general education and thorough legal training. The legal education which was fairly adequate under simpler economic conditions is inadequate to-day. It is the duty of the legal profession to strive to create and maintain standards of legal education and rules of admission to the bar which will protect the public both from incompetent legal advisers and from those who would disregard the obligations of professional service. This duty

can best be performed by the organized efforts of bar associations.

2. We endorse with the following explanations the standards with respect to admission to the bar, adopted by The American Bar Association on September 1, 1921:

Every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library, available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

3. Further, we believe that law schools should not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff should not depend on the number of students or on the fees received.

We agree with the American Bar Association that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to examination by public authority other than the authority of the law school of which he is a graduate.

5. Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class.

6. We endorse The American Bar Association's standards for admission to the bar because we are convinced that no such monopoly will result from adopting them. In almost every part of the country a young man of small means can, by energy and perseverance, obtain the college and law-school education which the standards require. And we understand that in applying the rule requiring two years of study in a college, educational experience other than that acquired in an American college may, in proper cases, be accepted as satisfying the requirement of the rule, if equivalent to two years of college work.

7. We believe that the adoption of these standards will increase the efficiency and strengthen the character of those coming to the practice of law, and will therefore tend to improve greatly the administration of justice. We therefore urge the bar associations of the several states to draft rules of admission to the bar carrying the standards into effect and to take such action as they may deem advisable to procure their adoption.

8. Whenever any state does not at present afford such educational opportunities to young men of small means as to warrant the immediate adoption of the standards, we urge the bar associa-

tions of the state to encourage and help the establishment and maintenance of good law schools and colleges, so that the standards may become practicable as soon as possible.

9. We believe that adequate intellectual requirements for admission to the bar will not only increase the efficiency of those admitted to practice but will also strengthen their moral character. But we are convinced that high ideals of professional duty must come chiefly from an understanding of the traditions and standards of the bar through study of such traditions and standards and by the personal contact of law students with members of the bar who are marked by a real interest in younger men, a love of their profession and a keen appreciation of the importance of its best traditions. We realize the difficulty of creating this kind of personal contact, especially in large cities; nevertheless, we believe that much can be accomplished by the intelligent cooperation between committees of the bar and law school faculties.

10. We therefore urge courts and bar associations to charge themselves with the duty of devising means for bringing law students in contact with members of the bar from whom they will learn, by example and precept, that admission to the bar is not a mere license to carry on a trade, but that it is an entrance into a profession with honorable traditions of service which they are bound to maintain.

DEAN OF THE COLLEGE OF LAW.—In December, 1921, and after the January number of the IOWA LAW BULLETIN had gone to press, Professor Dudley Odell McGovney tendered his resignation as Dean of the College of Law, and asked that he be relieved at once of his duties as Dean, in order that he might devote his time more fully to teaching. President Walter A. Jessup announced that his resignation would be accepted with regret. At a meeting of the State Board of Education on January 5, 1922, Professor Herbert Funk Goodrich was appointed Acting Dean of the College of Law to serve until such time as a permanent Dean should be appointed.

Professor McGovney will remain on the faculty as Professor of Law. He came to the State University of Iowa in 1916 from the University of Missouri, where he was Professor of Law. Acting Dean Goodrich came to the law faculty in 1914. He is a graduate of Carleton College and of the Harvard Law school.

On account of his duties as Acting Dean, Professor Goodrich was obliged to give up his work as Editor-in-charge of the IOWA LAW BULLETIN with the completion of the January number. Professor Edwin Wilhite Patterson succeeds him as Editor-in-charge, beginning with this issue.

UNIFORM LAW COMMISSIONERS.—Official representation for Iowa in the work of the national movement for Uniform State Laws was provided, for the first time, by Chapter 201 of the Acts of the 39th General Assembly. The statute directs the appointment of three commissioners, their organization, and that at least one be present at the national conference. It also provides for reports

and recommendations to the legislature by the commissioners. Members of the commission receive no salary, but are reimbursed for actual expenses incurred in their official duties.

The State is fortunate to have secured for the commission three lawyers of recognized standing and ability. Governor Kendall appointed Senator Charles M. Dutcher of Iowa City, Mr. Hazen I. Sawyer of Keokuk and Mr. Jesse E. Miller of Des Moines, to the positions. Mr. Dutcher is chairman, Mr. Sawyer secretary, of the local commission.

All the commissioners attended the last national conference held in Cincinnati prior to the meeting of the American Bar Association. The nature of a week's hard work, of three sessions daily, is seen from the nature of the subjects handled. The conference considered the eighth tentative draft of a Uniform Corporation Act, the first tentative draft of an Act relating to the Status and Protection of Illegitimate Children, the second tentative draft of a Uniform Declaratory Judgments Act and the first tentative draft of a Uniform Mortgage Act. It also considered the report of the Commercial Law Committee on amendments to the Warehouse Receipt and Bill of Lading Acts. All of the reports were recommitted for further consideration. Here at last is one body that does not subscribe to our American fetish of quantity production.

We have accepted the principle of uniform legislation here in Iowa by the adoption of several of the uniform statutes—the Negotiable Instruments Law, the Warehouse Receipts Act, the Bills of Lading Act, the Sales Act. Others—the Limited Partnership Act, and the Conditional Sales Act, have been included in the recommendations of the Code Commission and will be up for consideration when we get around to code revision. They have been discussed in prior numbers of this magazine. (See 5 IOWA LAW BULLETIN 129; 6 *ibid.* 1.)

The movement for uniform legislation has passed the experimental stage. Uniform state laws are accepted as meeting a real need. The national conference is wisely confining itself to those situations where uniformity is of immediate importance, and is avoiding even the appearance of superseding the legislative functions of the states. The uniform statutes are carefully drawn. The commissioners are lawyers of the highest type, leaders in the profession in their respective states. Being first-rate men themselves they do not hesitate to get expert assistance when they need it. Before an act is recommended for adoption it is written and rewritten, discussed from every angle. While a given result may not be perfect, it is as good as careful and intelligent drafting can make it. It is altogether desirable, therefore, that our State should have an official part in promoting a movement of this kind.

HERBERT F. GOODRICH.

WORKMEN'S COMPENSATION ACTS AND THE CONFLICT OF LAWS.[1]—An interesting question in connection with the Iowa Workmen's

[1]This note is a continuation of the discussion, "Workmen's Compensation Act Decisions," which appeared in the January number, 7 IOWA LAW BULLETIN, 100-111.

Compensation Act is whether an employee hired in Iowa can recover compensation under Iowa's act for an injury received outside of the state while in the course of his employment.[1a] The answer to this problem has differed depending on whether the courts have considered the compensation act as creating a statutory tort liability without fault on the part of the employer or as embodying a new provision in the contract of employment. Or, in brief terms, is the compensation act to be considered as a statutory or as a contractual substitute for the common law tort obligation?[2]

According to the common law, the *lex loci delicti* determines the liability in a tort action. If the compensation act is viewed merely as a statutory substitute for the common law tort obligation and A, hired in Iowa, is injured in Nebraska, A's relief will depend upon the law of Nebraska; while if A had been injured in Iowa his right to compensation would have been determined not by common law principles, but by the provisions of the Iowa compensation act. The earliest case[3] in this country dealing with this question was decided on the theory that the compensation act was a statutory substitute for the common law tort liability[4], and it is recognized as the leading case approaching the question from that angle. Following that theory, the Massachusetts' court did not allow an employee, a citizen and resident of Massachusetts who had entered into his contract of employment in that state with a Massachusetts corporation, to recover under the compensation act of Massachusetts for an injury received while working in the state of New York. But the court considered that non-resident employees of alien employers who while working in Massachusetts might receive injuries arising in the course of their employment, would be entitled to relief according to the provisions of the compensation act of Massachusetts. That is, the right to recover compensation is based on tort; the *lex loci delicti* determines the rights of the employee and

[1a] Many suppositions might be made which are likely to be met with as practical problems arising under compensation acts. Suppose a contract of hire in state A which has a compensation act and the injury in state B which has no act. Could the employee recover in B under A's act or would he be relegated to his common law tort action? Suppose that state B had a compensation act. Could the workmen recover in A under B's act; in B under A's act; in B under B's act? For a good discussion of some of these questions see, Angell, "Recovery under Workmen's Compensation Acts for Injury Abroad," 31 Harvard Law R. 619, and I Bradbury, Workman's Compensation (2d ed.) 34.

[2] The discussion in this note is confined to the so-called "optional" type of compensation act, such as that of Iowa.

[3] *Gould's case*, 215 Mass. 480; 102 N. E. 693; Ann. Cas. 1914 D, 372.

[4] The Massachusetts court felt that in the absence of an express intention that the statute was to have extra-territorial force, matters of procedure were too much of an obstacle to the enforcement of rights thus secured. Such interpretation of the act meant simply that the workman's right to recover compensation would be decided according to the rules governing common law tort actions except as modified by the statutory provisions of the act.

the obligations of the employer, and when the injury occurs in a state having a compensation act, relief to the employee is predicated upon the provisions of that statutory act.

However, the weight of authority[5] views the compensation act as a contractual substitute[6] for the common law tort obligation. There is, at least, an implied contract that the employer will pay compensation to the employee, whether or not there is any negligence or other wrongful act on the part of the employer.[7] The right to claim and the duty to pay compensation do not arise out of tort.[8] This idea of liability for injury irrespective of fault is in direct conflict with the fundamental rule of the modern common law as regards the ordinary requisites of a tort. In fact, workmen's compensation, both as to the right to claim and the duty to pay, is more like insurance, and the underlying conception is one of insurance.[9] Insurance contracts have generally been interpreted by the courts under the theory that the *lex loci contractus* governs the rights of the parties. It is only natural, then, that the same law should apply to cases arising under the compensation acts which are a form of insurance.[10] Under the provisions of the Iowa statute,[11] the parties, in the absence of notice to the contrary, would seem to have made the compensation act a part of the contract of hire.[12] Thence it follows, as pointed out by the Iowa court in the case of *Pierce* v. *Bekins V. & S. Co.*,[13] that the rights of the employee will be determined

---

[5]C. J., Tit. "Workmen's Compensation Acts," Div. IV, Conflict of Laws, Sec. 28; I Bradbury, Workman's Compensation (2d ed.) 47.

[6]For typical pronouncements of courts holding this view, see *Kennerson* v. *Thames Towboat Co.*, 89 Conn. 367, 371; 94 Atl. 372, L. R. A. 1916 A, 436; *Deeny* v. *Wright & Cobb Lighterage Co.*, 36 N. J. L. 121, 123; *Grinnell* v. *Wilkinson*, 39 R. I. 447, 98 Atl. 103, L. R. A. 1917 B, 767, Ann. Cas. 1918 B, 618.

[7]I Bradbury, Workman's Compensation (2d ed.) 47.

[8]Smith, "Sequel to Workmen's Compensation Acts," 27 Harvard Law R. 235, and 344; *Ives* v. *S. Buffalo Ry. Co.*, 201 N. Y. 271, 285, 94 N. E. 431.

[9]Angell, "Recovery under Workmen's Compensation Acts for Injury Abroad," 31 Harvard Law R. 619, 621; C. J., same title, Div. I, Sec. 4.

[10]See article cited *supra*, note 9, 31 Harvard Law R. 619, 622.

[11]Secs. 2477-m(a), 2477-m(4)[d], and 2477-m, 2(a), Code Supp. 13, provide that it is conclusively presumed that both employer and employee have elected to come within the provisions of the act in the absence of a notice to reject its provisions.

[12]A statute under which a contract was made was regarded in a foreign state as actually incorporated in the contract long before the question ever arose in connection with compensation acts. II Wharton, Conflict of Laws (3d ed.) sec. 1, note 1. The existing statutes and the settled law of the land at the time a contract is made become a part of it, and must be read into it. *Union Cent. L. Ins. Co.* v. *Pollard*, 94 Va. 146, 64 Am. St. Rep. 715, 36 L. R. A. 271; *Deweese* v. *Smith*, 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971; *Armour Packing Co.* v. *U. S.*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400. There may be a question whether such a statement will stand analysis.

[13]185 Iowa 1346, 1354, 172 N. W. 191. The court said, ". . . . With the statute read into the contract, there is an enforceable contract to be

according to the law of the state where the contract was entered into.[14] For if the parties have contracted that in case of injury the employee is to have compensation according to the provisions of our compensation act, then the rights and obligations of the parties in that respect will be determined, not by the *lex loci delicti*, or the law of the place where the injury occurred, but by the *lex loci contractus*, just as if the dispute were over a simple contract of hire or a promissory note.

The procedural methods provided for by compensation acts have caused some difficulty in allowing the injured workman to recover under the act of the state of hiring when the injury occurred outside that state. A late Michigan case[15] allowed relief despite a provision in the act for hearings of the committee of arbitration at the locality where the injury occurred, and other provisions of like nature. At the time the Iowa case[16] mentioned above was decided, the Iowa act contained such a provision[17] relative to the place where the committee of arbitration was to meet for its hearing. That provision has since been repealed and a substitute[18] measure enacted which provides that if the injury happens outside of the state, the committee of arbitration will meet in the county seat of this state which is nearest to the place of injury.

The theory that the compensation act is embodied as a part of the contract of employment, because of the sections of the act above referred to,[18a] may be questioned on the ground that it does not meet the requirements of sound contract law. It is not unlikely that parties sometimes enter into a contract of employment, and come under the provisions of the compensation act, though ignorant of the fact at the time. Mutual assent is one of the essentials for the formation of a simple contract. The mutual assent must be expressed by one party to the other and except as so expressed is unimportant.[19] The principle of saying that certain rights and obligations will be imposed upon parties if they do not speak seems contrary to the common law principles as to the formation of a contract when there is no duty to speak. And is it sound to say that a contract is formed by silence where the law imposes a duty to speak? While the Iowa act is nominally optional, yet the employer is almost forced to accept its terms because of the undue hardship resulting if he fails to accept. If he rejects the provisions

---

paid according to the statute, though the injury be suffered outside of the state."

[14]"With the possible exception of contracts wherein it is intended that the same shall be performed wholly without the state, the courts will apply the domestic compensation law where the contract of employment was entered into within the state, on the theory that the obligation sought to be enforced is based on contract and not on tort." 185 Iowa 1346, 1354.

[15]*Crane* v. *Leonard, Crossette & Riley*, 183 N. W. 204.

[16]*Pierce* v. *Bekins V. & S. Co.*, 185 Iowa 1346, 172 N. W. 191.

[17]Sec. 2477-m, 29, Code Supp. '13.

[18]38 G. A., Ch. 220, Sec. 8.

[18a]*Supra*, note 11.

[19]Williston, Contracts, sec. 22.

of the act he is presumed to have been negligent and that such negligence was the proximate cause of the injury, and he is deprived of such defenses as contributory negligence, assumption of risk, and negligence of a co-employee.[20]

Probably it would be more accurate to say that the right to claim compensation is an incident of the relation of employer and employee; and since this relation came about by contract, it is reasonable to say that the same law governs the incidents of that relation which governs the contract from which these incidents arose. While most of the courts and legal writers favor the view that the compensation act is to be considered as a contractual substitute for the common law tort obligation both on grounds of expediency and of principle,[21] probably the matter of expediency[22] has been a most important factor leading to the adoption of the so-called contractual theory.

COVENANTS NOT TO SUE AND RELEASES.—The effect of a release or a covenant not to sue, when given to one of joint obligors or to one of joint tort-feasors is quite well settled; namely a release of one discharges the others,[1] while a covenant not to sue one does not discharge the others.[2] The purpose of this note is not only to seek the reasons for this distinction, but to consider the application of releases, and of covenants not to sue, to a third situation in which we find an obligor and an actor each under a several liability arising out of the same event. This situation has arisen in Iowa as a result of the Workmen's Compensation Act.[3] In this particular case, the plaintiff's intestate was employed by the defendant, a laundry company, to drive a laundry wagon. While thus engaged, a collision occurred between the wagon and a street-car, in which the intestate was injured. He

[20]Sec. 2477-m(c) (1) (2) (3) (4)[d], Code Supp. '13.

[21]We find Mr. Bradbury in the second edition of his work partially receding from the position taken in the first edition, and stating that he believes the final doctrine to be established will be that "the law of the place where a contract of employment is made will govern the rights and liabilities of employees and employers to claim and to pay compensation." I Bradbury, Workman's Compensation (2d ed.) 56, and see p. 57; also note 1 on page 51, in which he states his belief that such a course is justified both on legal grounds and considerations of expediency.

[22]Suppose the theory is adopted that the compensation act is a statutory substitute for the common law tort obligation. The employee is hired in state A whose compensation act provides for a summary trial before a judge of a particular court. The injury occurs in state B whose act gives to an Industrial Commission exclusive jurisdiction to hear and determine such controversies. Under this theory the workman cannot recover under the act of the state of hiring; and if he could not secure jurisdiction over his employer in state B, he would probably find that state A could not enforce the provisions of B's compensation act because of the lack of proper judicial and administrative machinery.

[1]I WILLISTON, CONTRACTS, Sec. 334 and Sec. 338a.

[2]I WILLISTON, CONTRACTS, Sec. 338.

[3]*Renner* v. *Model Laundry, Cleaning and Dyeing Co.*, 184 N. W. 611 (Iowa Sup. Ct.) See 7 IOWA LAW BULLETIN 107.

signed an agreement covenanting not to sue the railway company in consideration of $750.00. The concluding sentence of the agreement was as follows: "It is hereby expressly agreed that this instrument is not a release of the said railway company . . . , but is simply a covenant not to sue the said railway company, its officers, servants or employees on account of the injuries above mentioned." The court held that this was a valid covenant not to sue, that the burden of proving that it was meant as a release was on the defendant who sought to set-off the $750.00, and that the defendant had not proved it was anything else than what it purported to be, a covenant not to sue. The situation in the case was this: one party obligated as the result of an incident attached to the relationship of employer and employee by the Workmen's Compensation Act; another party conceivably liable as the result of an act which was a breach of legal duty.

It is self-evident that the effect of releases and of covenants not to sue is obtained by operation upon rights of the covenantor or releasor. "All rights may be divided into three main divisions: 1, primary rights; 2, secondary rights; 3, remedial rights. The first division, primary rights, includes all the rights created by law and existent in the ordinary proper course of events, unaffected by illegal interference. The second division, secondary rights, includes rights which arise upon the violation of primary rights by the wrong of some responsible human actor; they are created by law in order that reparation may be made for the wrongful destruction of each primary right. The third division, remedial rights, consists of rights to sue and to enforce judgment; all rights in short which are created to secure the actual enforcement of secondary rights."[4]

Although the above analysis is not entirely satisfactory for dealing with a liability imposed by a statute, as the Workmen's Compensation Act, yet it will aid in ascertaining what right or rights are affected by a release or a covenant not to sue. With regard to the railway company, the driver of the wagon had the primary right to personal security. The secondary right provided by law as a substitute for the destroyed primary right, took the form in this case of a right to redress against the railway company. Naturally we must bear in mind that the mere destruction of a primary right does not give rise to a secondary right. There must have been a legal wrong committed by the person causing the destruction.[5] We find a hint of this in the instant case when the Court placed upon the defendant the burden of proving that circumstances created a legal liability in the railway company, before it would consider the agreement as anything else than a covenant not to sue. The remedial right was very apparently the right to sue. With regard to the employer, the primary right of the

[4] BEALE, A TREATISE ON THE CONFLICT OF LAWS, Vol. I, Part 1, Sec. 140.
[5] *Emerson* v. *Chicago, R. I. & P. Ry. Co.*, 182 N. W. 376. (Iowa Sup. Ct.); *Upp* v. *Darner*, 150 Iowa 403, 130 N. W. 409.

employee is given by statute and is hard to define. It seems to be in the nature of an absolute right to personal security while engaged in the employer's business. The secondary right is the right to compensation. In this case it is not dependent upon the commission of a legal wrong by some responsible actor, but upon some injury resulting to the employee. The remedial right is the right to sue the employer and get judgment against him. This analysis prepares the field for an inquiry into what rights are affected by releases and covenants not to sue.

Inasmuch as the effect of a release is different from that of a covenant not to sue, different rights must be affected by them. It has already been stated that a release of one of joint obligors or of one of joint tort-feasors discharges all. The same is true in case of a joint and several liability.[6] What right or rights as defined by the preceding analysis has the releasor lost? He has lost more than his remedial rights, for even equity courts have given very little relief from the application of the rule where it has worked injustice and violated the intention of the parties.[7] Were it a matter of remedy alone, the equity court would find a natural field for giving relief. On the other hand, the release does not destroy the primary right of the releasor, for *ex hypothesi*, that has already been destroyed by the invasion of the primary right. The conclusion is that the release extinguishes the secondary right of the releasor, namely, the substitute given him by law, the right to reparation, enforceable in a law court. It is the duty correlative to this right that is regarded as one and indivisible.[8]

As has been stated before, the covenant not to sue one of joint obligors or one of joint tort-feasors does not release the others. It would seem that not even remedial rights were lost by giving such a covenant. We can appraise the real value of a covenant not to sue in its effect when made between a single debtor and his creditor. Equity has constituted it a bar to the action by the covenantor upon the original cause of action in order to avoid a circuity of action.[9] From this result it appears that nothing more than a remedial right can be affected. From a theoretical viewpoint, it would seem logical to say that a covenant not to sue one of joint obligors or joint tort-feasors would likewise destroy the remedial right of the covenantor against the covenantee. But for practical reasons the courts refused to concede this result to a covenant not to sue, since the technical rules as to joinder of defendants and as to their defenses would result in the release of all.[10] The courts were driven to the choice of either upholding the technicality of the rules as to joinder of defendants and their defense, or main-

[6] I WILLISTON, CONTRACTS, Sec. 334.
[7] *Ibid*, Sec. 335.
[8] *Ibid*, Sec. 338.
[9] *Ibid*, Sec. 333.
[10] *Ibid*, Sec. 338.

taining logical consistency in dealing with covenants not to sue. They chose the former. Inasmuch as statutes have changed these rules as to joinder of defendants,[11] the courts would probably decide in favor of the latter choice today. On the whole, however, the covenant not to sue would seem to extinguish only the remedial right, at most.

In the light of these two conclusions that a release destroys the secondary right while a covenant not to sue destroys only remedial rights, the decision in *Renner* v. *Model Laundry etc. Co.,* that the employer had not lost his right of subrogation against the railroad because of the employee's covenant not to sue, would seem to be correct. The covenantor has retained his secondary right, if he had one, against the covenantee. This means that the covenantee still owes the correlative duty, with an equitable defense against the covenantor, but against no one else. The covenantor did not bind anyone else by his agreement.

The real difficulty comes in determining whether a particular instrument is a release or a covenant not to sue. If it appears that the sum received as consideration for a covenant was paid as full compensation for the extinguishment of the secondary right, or was so large that any verdict for more would be excessive, no further action should be allowed, whatever the mere form or name of the instrument relied on as a discharge.[12] If, on the other hand, the sum is so small as to indicate that it was not a release of the secondary right, but a mere extinguishment of a particular remedial right, then the instrument is a covenant not to sue. In *Renner* v. *Model Laundry, Etc. Co., supra,* the sum paid, $750, was not so large as to give rise to an inference that the instrument was, in substance, a release of the secondary right.[13]

PAROLE EVIDENCE RULE AS LEGAL INTEGRATION.—For the sake of brevity a discussion of the "parol evidence rule" requires that the problem be definitely restricted, because even a cursory analysis of the subject as a whole would carry one far afield.[1] It is the purpose here to omit all consideration of collateral written agreements, of patently incomplete or ambiguous instruments, and all elements of fraud, accident or mistake, and merely to look to the situation where two parties come before the court with a written agreement and one of them offers to prove an oral agreement. What is it, in that situation, which brings the extrinsic oral material into such a mooted position?

The stock objection is, of course, that parol evidence cannot be used to "vary," "alter," or "contradict" the writing. However,

[11]Iowa Code, 1897, Sec. 3465; Code 1919, Sec. 7090.

[12]I WILLISTON, CONTRACTS, Sec. 338c.

[13]But see a criticism of this case in 35 Harvard Law Review 475.

[1]Professor Wigmore's thorough analysis of all the various meanings of "the parole evidence rule" occupies 153 pages. 4 WIGMORE, EVIDENCE, secs. 2400-2478. Professor Williston devotes thirty-five pages to the "parole evidence rule." 2 WILLISTON, CONTRACTS, secs. 631-647.

litigation is constantly recurring over the application of that objection. The cases are overrun with the words "vary," "alter," and "contradict"; indeed, those very cases reach their conclusions in a manner so summary that one might easily gain the superficial impression that the reasons and principles underlying the subject are no longer of importance.

The difficulty is here: It is of no avail to state the rule; once the writing is established and it is determined what is and what is not included therein, the rule can operate. But the heaviest task is that very determination—to ascertain exactly what the parties have agreed to in the writing. Professor Wigmore uses the term "Legal Integration" to denote this situation. As he pictures it, a piece of writing has been preceded by negotiations back and forth. During that time many things are agreed to orally. The process of integration occurs when the parties finally collect these agreements together, in one writing.[1a]

Of itself, that is a mere conclusion. But it does tend to bring out the fact that it is the relevancy of the parts not embodied in the writing which comes into question and not the manner of proof.[2] It is not a rule of evidence which keeps out the oral agreements, but a rule of the substantive law of contracts.[3] For example, if a defendant on trial for manslaughter were to offer proof of his actual specific intent it would be irrelevant,[4] because of a rule of substantive law and not the law of evidence. Here, then, is a rule of contracts which forbids, not the evidence, but the things attempted, viz., the variation. That is, when a legal transaction has been reduced to writing, all other evidence of that particular negotiation becomes legally ineffective.[5]

It is submitted that the fundamental basis of the rule is the thought of adding security to the writings men make for themselves;[6] the old inherent distrust of uncertainty[7] and the fear that

[1a] Wigmore on Evidence, section 2429.

[2] This seems to be recognized by the Iowa Court when it says: "The rule is uniformly, and with especial force, directed against the admissibility of any evidence other than that furnished by the writing itself. . . ." *Myers* v. *Sunderland*, 4 Greene 567. See also *Congower* v. *Endowment Association*, 94 Iowa 499. See also those cases in which the writing is in question between third parties; 34 Harvard Law Review 790; *Livingston* v. *Stevens*, 122 Iowa 62.

[3] *Pitcairn* v. *Hiss*, 125 Federal 110.

[4] *State* v. *Vines*, 93 N. C. 493.

[5] *Myers* v. *Sunderland*, *supra*.

[6] This thought is well expressed by Chief Justice Parker speaking for the Massachusetts court in *Dwight* v. *Pomeroy*, 17 Mass. 302: "If now and then, through carelessness or inattention, an instrument formally drawn up fail of expressing the true intent of the parties, it is better they should suffer than to have a system adopted the natural tendency of which would be to increase uncertainty, multiply instances of negligence, and hold out lures for false testimony. If on the other hand, the rule is rigidly adhered to, men will conform themselves to it; they will take counsel and act cautiously and instances will seldom, if ever, occur of fatal mistakes in their bargains."

[7] See Corbin, "Conditions in Contracts," 28 Yale Law Journal 752, for a comment on the "illusion of certainty."

an expressed consideration may have to support undertakings that were never contemplated.[8] That is readily enough demonstrated by the fact that subject matter not covered by the writing, so far as the law of contracts is concerned, may be proved in any manner whatsoever.

Numerous typical instances of this application have been made by the Iowa Supreme Court. In *Meader* v. *Allen*,[9] the Iowa court passed on both sides of the proposition. Plaintiff agreed to drill a well for defendant and to furnish the casing. The court refused to allow defendant to show an oral agreement to furnish a pump. Even though not one word had been said about the pump, it is to be inferred from ordinary experience that a pump is a part of the equipment of a well. Granting that the writing has covered all their agreement, the fact that an agreement about the pump was left out would tend to indicate that they had talked about the pump and had left out any obligation on the part of the driller to furnish one.

An analogous situation arises concerning the admission of proof of oral warranties in the sale of personal property. In *Blackmore* v. *Fairbanks*,[10] defendant ordered an engine which was warranted in writing but nothing was said about the use it should be put to. In another case, *Berthold* v. *Seevers*,[11] defendant ordered piles for a bridge and in the writing stipulated for piles of a certain specified size and quantity. In the *Fairbanks* case the court laid down the general rule that an express warranty does not exclude an implied warranty[12] and that plaintiff might show that the machinery was not fit for the use it was intended for. In the *Berthold* case defendant was not allowed to introduce facts tending to show a breach of an implied warranty because in that case the writing had covered the ground of implied warranty. In comparing the two cases it becomes necessary again to refer to the criterion, whether or not the subject under consideration is covered by the writing.

Two simpler and more direct illustrations of fact occur in the two cases of *Banwart* v. *Schullenberg*[13] and *Fudge* v. *Kelley*.[14] Both related to farm leases. In each the tenant offered an oral agreement with the landlord; in one, an oral agreement by the landlord to tile the land, in the other, an oral warranty that all the cows on the farm were with calf. The warranty in *Fudge* v. *Kelley*[14] was admitted on the ground that it had not been touched by the writing; yet in the case of *Banwart* v. *Schullenberg* where no one word had been said about tiling, the court excluded the oral agreement to tile.

---

[8] *Banwart* v. *Schullenberg*, 180 N. W. 190 (Iowa Sup. Ct.).
[9] 110 Iowa 588.
[10] 79 Iowa 282.
[11] 89 Iowa 509.
[12] See also: *Pew* v. *Karley*, 154 Iowa 559; *Bucy* v. *Pitts*, 89 Iowa 464; *Checkrower Co.* v. *Bradley*, 105 Iowa 537; *Heating Co.* v. *Kramer*, 127 Iowa 142.
[13] 180 N. W. 190. (Iowa Sup. Ct.)
[14] 171 Iowa 422.

Here were these two agreements; to get to the root of the thing in plain language the sole question was whether they were covered in the writing. In neither had they been expressly touched. What is the answer? The courts say, inquire into "the intent of the parties." "The intent of the parties" a convenient expression which is just vague enough to be useful in a bad situation. It fallaciously assumes that the parties ever had a common intent. But aside from that, anyone will recognize the futility of attempting to search the minds of Mr. Banwart and Mr. Schullenberg for what they may or may not have intended to include in this written contract.

Originally the scope of a promise was determined entirely upon the external standard. In the early English cases it depended entirely upon the effect upon the promisee.[15] That same attitude has prevailed with some slight modifications down to modern times.[16] In fact it is to be granted that the external standard cannot be done away with. In some quarters it has been ventured to draw a close analogy, in the matter of intent, to the underlying theory of torts which attaches to a man's acts, responsibility for those things which reasonably could have been foreseen.[17]

Certain it is, on authority, that in getting at what those parties included in their writing, the court must look to all the surrounding circumstances. In the last analysis it comes to this: Do two men contract with regard to a farm lease and not presumably agree as to tiling? Do they stipulate for a farm lease without agreeing as to the condition of the cows on the farm? The answer lies in common every day experience. The Iowa Court has given its answer and in so doing its members have used their experience and judgment as men of every day affairs.

When all is said and done, the application of the rule is simple, once we determine what is and what is not covered by the writing; then, in the face of that writing all other agreements on that same subject become irrelevant. The court will not necessarily question their existence, but will say that such agreements are ineffective.[18] The prohibition does not attack the veracity of the proof nor the manner in which it is offered; it goes to its relevancy to the issue and even though it were admitted without objection of counsel, the jury should be instructed to disregard it.[19]

THE IOWA FENCING LAWS.—The old common law of England held that if a man kept domestic animals he did so at his peril, and, in

[15] WILLISTON, CONTRACTS, sec. 21.

[16] See *Chariton Ice Co.* v. *Spring Lake Ice Co.*, 129 Iowa 523, in which there was a contract to pay the expenses of an ice harvest; *Held*, to include an agreement to pay pond rentals. The court says: "Neither is evidence admissible of the unexpressed intention the parties may have entertained but failed to embody in their writing."

[17] WIGMORE, EVIDENCE, sec. 2413.

[18] *Atherton* v. *Deamond*, 33 Iowa 354.

[19] *Pitcairn* v. *Hiss*, 125 Fed. 110; *Hamilton* v. *Railroad Co.*, 51 N. Y. 100; *Utter* v. *Vance*, 7 Blackf. (Ind.) 514.

general, not even the showing of the exercise of either ordinary or extraordinary care would excuse an owner from liability for the injuries to persons or property of others by virtue of the trespasses of his domestic animals.[1] There were only a few exceptions to this general rule.[2] This rule was brought over and adopted by the more thickly settled eastern states of this country.[3] In Iowa, however, this rule was held to be inapplicable to the institutions and customs of this western country and in an early case Chief Justice Wright refused to adhere to it.[4] This judge laid down the rule that, in the absence of statute, domestic animals were "free commoners" and might lawfully run at large and the owner not be liable for their trespasses unless the property injured was enclosed by a lawful fence.[5] This modification was adopted in many other western states and was recognized and followed by the United States Supreme court in cases of this sort arising in states where the situation was similar to the one in this state.[6] The rule was based upon the theory that the owner of domestic animals should not be charged with knowledge of what his stock was doing, and, therefore, did not exempt the owner who drove his stock upon another's land from liability for injuries done by them while there.[7] On the other hand, cattle trespassing on another's land were considered only as licensees and the owner of the land was not liable for passive negligence or acts of non-feasance whereby the stock were injured.[8] Such in general was the "common law" of Iowa before the enactment of any statutes on the subject.

Before long statutes were passed which altered the rule of *Wagner* v. *Bissel*[4] to a great extent. These statutes were not passed all at once nor in close sequence but simply came into existence as the result of changing customs and increasing density of population. The Iowa statutes which have been passed upon this subject may be divided roughly into two classes. Under the first class may be put those statutes which provide for the erection and maintenance of lawful fences, including partition fences, the definition of lawful fences, and the liability of owners of animals trespassing upon land fenced as provided by law. Under the second class may be put those statutes which provide for the restraint of domestic animals under certain circumstances, provisions as to what shall constitute running at large, and the liability attaching to owners of trespassing animals running at large.

---

[1] *Noyes* v. *Colby*, 30 N. H. 143; *Railroad* v. *Munger*, 5 Denio 255.

[2] *Brown* v. *Moyer*, 171 Ia. 296; *Tillet* v. *Ward*, 10 Q. B. 255.

[3] *Noyes* v. *Colby*, *supra*.

[4] *Wagner* v. *Bissel*, 5 Ia. 396.

[5] *Ibid.*

[6] *Seely* v. *Peters*, 5 Gilm. (Ill.) 130; *Buford* v. *Houtz*, 5 Utah 591; *Martin* v. *Sheep Co.*, 76 Pac. 571; *Buford* v. *Houtz*, 133 U. S. 320.

[7] *Erbes* v. *Wehmeyaer*, 69 Ia. 85.

[8] *Haughey* v. *Hart*, 62 Ia. 96; *Herold* v. *Meyer*, 20 Ia. 378; *Asperquern* v. *Kotas*, 91 Ia. 497.

Under the first class are statutes which provide that the township trustees shall be the fence viewers,[9] definition of a lawful fence,[10] and the section providing for the erection and maintenance of a lawful partition fence.[11] The section dealing with the latter[11] provides that adjoining land owners must upon the request of either owner contribute to the erection and maintenance of a partition fence between their lands. The Code provides that the fence-viewers shall decide all controversies arising between the owners, including whether the fence shall or shall not be "hog tight,"[12] and, also, that these sections apply to all districts whether stock is restrained by law from running at large or not.[13] In the last section under this class is the provision to the effect that the owner of animals shall be liable for damage done by such animals while trespassing upon land lawfully fenced unless the animals escaped onto the land by virtue of such landowner's neglect to maintain his part of the partition fence.[13] There are many decisions interpreting these statutes, only a few of which can be here set forth. The most important interpretation is the rule recently laid down by the supreme court, that where an owner of land neglects to maintain his part of a partition fence, he is liable for any damage resulting therefrom to the adjoining owner, whether it be damage to the land by virtue of his own stock breaking through, or injury to the other's stock by virtue of their becoming foundered on his crops, or becoming injured in any other way.[14]

Another case laid down the rule that if one land owner keeps his part of the partition fence "hog tight" he may require the same of the adjoining landowner.[15] Also, when the partition line has been agreed upon and apportioned between the respective landowners, each owner is liable for damages done by stock crossing the part of the line he has agreed to protect.[16] Other decisions construing these statutes are given below.[17]

In the second class of statutes are provisions which cover almost all kinds of stock. All male animals are to be restrained from running at large at all times.[18] The so-called "herd law" provides a method whereby counties by submitting the question to popular vote may prescribe what other kinds of animals must be restrained

---

[9]Sec. 224, C. '51.
[10]Sec. 1199, C. C. '19; sec. 2367, C. '97.
[11]Sec. 1187, C. C. '19; sec. 2355, C. '97.
[12]Sec. 1199, C. C. '19.
[13]Sec. 1823, C. C. '19; sec. 2313 C. '97.
[14]*Osgood* v. *Names*, 184 N. W. 331.
[15]*Mitchell* v. *Grover*, 158 Ia. 188.
[16]*Little* v. *Lauback*, 168 N. W. 155.
[17]*Little* v. *McGuire*, 43 Ia. 447 (Constitutionality); *De Mers* v. *Rohan*, 126 Ia. 488 (Where no partition fence has been ordered); *Smith* v. *Flowers*, 169 N. W. 698 (Two ways to compel owners to erect partition fences); *Syas* v. *Peck*, 58 Ia. 256 (Land used in common); *Meyers* v. *Tallman*, 169 Ia. 104 (Definition of hog tight fence); *Russell* v. *Hauley*, 20 Ia. 219 (No liability where third party lets down fence).
[18]Sec. 1822, C. C. '19; sec. 2312 C. '97.

and at what times.[19] A third statute provides that swine, sheep, and goats, male animals, and all other animals coming under the operation of the herd law shall be restrained from running at large and may be distrained and held for damage if so found. It further provides however, that no animal is at large when on unimproved lands, or under efficient control of the owner, or being driven on the highway under such control.[20] These statutes as interpreted, however, do not make it contributory negligence to let animals run at large so as to bar to the owner recovery for injuries done to them by negligence of a railroad or by dogs of another.[21] Again, this statute does not apply to domestic fowls or to dogs.[22] Fowls are "free commoners" still and the last General Assembly passed special acts with regard to dogs.[23] Other cases which have construed these statutes are given below.[24]

To sum up the law as it stands today: It is quite different from that of the time of the decision of *Wagner* v. *Bissel*. Swine, sheep, goats, all male animals, and all other stock, with the exception of fowls and dogs, in those counties where the herd law has been adopted, are to be restrained from running at large. In those counties the owner is liable for all damage done to another's land, whether such land be fenced or not. Correspondingly, in those districts there is no obligation to fence against another's stock. These rules, of course, do not apply to fowls or dogs. In those counties, if any, that have not adopted the herd law, the rule of *Wagner* v. *Bissel* still applies with the exception that all male animals and swine, sheep and goats must be restrained at all times. As to the obligation to fence, owners of adjoining tracts are required to maintain partition fences at the request of either owner or at the order of the fence-viewers. If one owner keeps his part of the partition fence "hog tight" the other owner must keep his in the same manner. If the line has been established and it has been ordered or agreed that a partition fence shall be built, either owner is liable for all damages resulting from his failure to protect his portion of the line and if the statute fails to provide a suitable remedy, the common law remedy may be used. However, if no line has been established then neither owner shall be liable for damage done by stock crossing the line. The result is that Iowa has finally come very close to adopting the old common law rule in force in England and in the eastern states. The development of the law on this subject is an interesting example of the adaptation of law to changing customs and social conditions.

---

[19] See *Little* v. *McGuire*, 38 Ia. 560.
[20] Sec. 1824, C. C. '19; sec. 2314 C. '97.
[21] *Story* v. *Railroad*, 79 Ia. 402; *Beckler* v. *Merringer*, 131 Ia. 164.
[22] *Kimple* v. *Shafer*, 161 Ia. 659.
[23] Laws 1921, ch. 140.
[24] *Banks* v. *Lohmeyer*, 173 N. W. 788; *Little* v. *McGuire*, *supra*, note (3); *Aylesworth* v. *Railroad*, 38 Ia. 459; *Aspergern* v. *Kotas*, *supra*, note (3).

RECENT CASES

ADMINISTRATION OF ESTATES—PROBATE COURT'S CONTROL OVER SUIT BY ADMINISTRATRIX IN ANOTHER STATE.—The Chicago, R. I. & P. R. Co. applied to the district court of Emmet County, Iowa, in probate, for an order directing the administratrix of an estate to dismiss an action brought by her illegally in the district court of Douglas County, Minnesota, under the Federal Employer's Liability Act for the death of her husband. Held, that the probate court erred in overruling the application. *Spoo* v. *Chicago, R. I. & P. R. Co.*, 183 N. W. 580 (Iowa Sup. Ct.)

The opinion definitely states that no particular question was raised as to the jurisdiction of a probate court in issuing such an order, and the court assumes, without objection, that such power exists as necessary "in the proper administration of the estate" and that to overrule the application was "to limit its authority over its officers." Whether such power does rightfully exist seems, nevertheless, an interesting subject of inquiry.

Ordinarily such an injunction is properly issued in equity. *Eingartner* v. *Illinois Steel Co.*, 94 Wis. 70; *Miller* v. *Gittings*, 85 Md. 601; *Bigelow* v. *Old Dominion Copper Co.*, 74 N. J. Eq. 457; *Hawkins* v. *Ireland*, 64 Minn. 339; *Reed's Adm'x* v. *I. C. Ry. Co.*, 182 Ky. 455.

It is hardly open to doubt that the Iowa statutes do not expressly authorize such action by a probate court. Sec. 3261 to 3423, Code 1897; Secs. 7775 to 7950, Compiled Code 1919.

In general, authorities do not favor broad extension of the powers expressly granted to courts of probate upon the theory of collateral jurisdiction, although some collateral or ancillary powers are conceded in all jurisdictions. WOERNER, AMERICAN LAW OF ADMINISTRATION, Sec. 156; 14 R. C. L. 415; 37 L. R. A. 654. "Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given either expressly or by implication, the whole proceeding is void; but where jurisdiction is conferred over any subject-matter and it becomes necessary in the adjudication thereof to decide collateral matters over which no jurisdiction has been conferred, the court must, of necessity, decide such collateral issues." WOERNER, AMERICAN LAW OF ADMINISTRATION, Sec. 142. It is evident that if the exercise of power that was here sanctioned is to be supported it must be as ancillary to the probate court's general control of its officer, the administratrix.

The Iowa Supreme Court has held it proper for the probate court to direct an administrator "as to the manner in which to proceed in order to best preserve and protect the estate" where the object was the release of mortgage liens in favor of the estate. *Citizens State Bank* v. *Victoria Sanitarium*, 179 Iowa 670, 161 N. W. 664. Although the doctrine of this case is hardly consistent

with that of other jurisdictions which have held that the probate court has no power to direct an administrator where and how to keep the assets of an estate, *Purcell* v. *Young*, 110 Cal. 605; *Vandevier* v. *The County Court of Arapahoe County*, 3 Colo. App. 425 —yet it seems hardly open to question that this recent decision is consistent with the Iowa Supreme Court's previous attitude. Accordingly, the court of probate in ordering an administrator to bring suit for the wrongful death of the decedent, might properly order him to commence action *only* in a court in which he might legally have it adjudicated.

Conceding the propriety of the exercise of the power upon the above theory, still the special facts of the case give rise to another question. A third party who was neither officer of administration nor one interested in the benefits of the administration applied for the order. There are numerous *dicta* to the effect that the administrator is servant as much of the parties whose rights are antagonistic to the distributees as of the distributees themselves. WOERNER, AMERICAN LAW OF ADMINISTRATION, Sec. 10. It would follow logically from this theory that, once the power of the court to control its officer in a certain respect is established, it would make no difference who applied for the order or instigated the control. The previous Iowa decisions, however, do not indicate positively that this theory is accepted. Under the Iowa statute expressly authorizing application for removal of an administrator by one "interested in the estate," it has been repeatedly held that "a party against whom an administrator is prosecuting an action for damages due to the estate has not such an interest in the estate as to be entitled to ask for the removal of the administrator." *Chicago, B. & Q. R. Co.*, 64 Iowa 343, 20 N. W. 464; *In re Estate of Stone*, 173 Iowa 373, 155 N. W. 823. The same practical reasons which support the Iowa decisions on that point would seem to support a contrary result in the immediate case. It certainly is not desirable to encourage public participation in the management of estates, yet, unless this decision is to be explained away on the ground that the illegality of the act of the administratrix warranted a special rule, the decision must be interpreted as a step in that direction.

ASSIGNMENTS—QUITCLAIM OF HEIR'S EXPECTANT INTEREST IN FATHER'S ESTATE.—The plaintiff quitclaimed his expectant interest in his father's estate to the other heirs in consideration of their advances made to him for the purpose of paying off his existing debts. Held, that while the conveyance of the expectant estate was void in law, it would be good in equity. *Klingensmith* v. *Klingensmith*, 185 N. W. 75 (Iowa Sup. Ct.).

The interest which the plaintiff possessed in his father's estate as heir apparent is a bare possibility and is not subject to any disposition in law because it has no actual or potential existence. In equity, however, the general rule is that the assignments of contingent interests and expectancies will be operative as soon as the

property has vested in the assignor. 57 Am. Dec. 440n. The great weight of authority is that an assignment of the naked possibility or expectancy of an heir apparent will be enforced in equity after the death of the ancestor. 33 L. R. A. 266n; 56 Am. St. Rep. 339n. This is the rule in Iowa. *Richey* v. *Richey,* 179 N. W. 830; *Mally* v. *Mally* 121 Iowa, 169, 96 N. W. 735. It seems essential that the contract be made in good faith and for adequate consideration, since these assignments are not favored because of their possible use as a means of fraud or oppression. *Edler v. Frazier,* 174 Iowa 46, 156 N. W. 182. For this reason some authorities require that the assignment be made with the ancestor's consent or acquiescence. *Boynton* v. *Hubbard,* 7 Mass. 112; *McClure* v. *Raben,* 125 Ind. 139, 25 N. E. 179; S. C., 133 Ind. 507, 33 N. E. 275. Other courts take the view that such consent or acquiescence is unnecessary. *Hale* v. *Hollon,* 90 Tex. 427, 39 S. W. 287; *Fuller* v. *Parmenter,* 72 Vt. 362, 47 Atl. 1079. In Iowa, no opinion has been expressed on this point although it was discussed in Mally v. Mally, *supra.*

It is submitted that an assignment of an expectant interest may be upheld in equity on one of three possible theories, namely: (1) As an agreement enforceable on the principle of specific performance; (2) as an equitable conveyance operating *in futuro*; or (3) as a conveyance based on the broad principle of equitable estoppel. The theory most commonly advanced to sustain assignments of expectant interests is that of specific performance. These assignments, however, do not purport to be executory contracts but do purport to be self-executing conveyances, and therefore it does not seem that the principle of specific performance is strictly applicable. Moreover, the principle of specific performance carries with it certain limitations which will unduly hamper its operation in assignments of this kind. In *Tailby* v. *Official Receiver,* L. R. 13 A. C. 523, the House of Lords rejected the theory of specific performance as the underlying principle of these assignments and placed them on the ground of equitable transfers operating *in futuro.* The principal case recognizes the third theory. Equitable estoppel must, of course, be distinguished from estoppel by deed, which arises out of the covenants in the deed, and is recognized in law. In a quitclaim deed, however, there are neither covenants upon which to base a legal estoppel nor representations upon which to base an equitable estoppel, and it does not appear that there is any reason why the principle of estoppel should be applied. It would seem preferable to support these assignments of expectancies as equitable conveyances operating *in futuro.*

BILLS AND NOTES—PAROLE EVIDENCE TO RESTRICT LIABILITY OF BLANK INDORSER OF NON-NEGOTIABLE NOTE.—Defendant, the payee of a non-negotiable note, indorsed it in blank to Roberts as collateral. Roberts indorsed it by an assignment in blank without recourse and returned it to defendant, who transferred it without further indorsement to Harris, orally agreeing with Harris that the

blank indorsement was to pass title only, and was to be without recourse. The note is now in the hands of the plaintiff, a *bona fide* holder, who recovered against both the defendant and the makers. Defendant appeals on the ground that the evidence of the oral agreement between himself and Harris was improperly excluded. Held, that the evidence was inadmissible against the plaintiff. *Berry* v. *Gross,* 184 N. W. 661. (Iowa Sup. Ct.)

It is the well settled rule in Iowa that the indorser of a non-negotiable note is liable to his indorsee. Code, 1897, Sec. 3048; *Long & Smyser* v. *Hawthorne,* 3 Iowa 266; *Wilson* v. *Ralph,* 3 Iowa 450; *Park* v. *Best,* 176 Iowa 7, 157 N. W. 233. This liability is like the execution of a new note. *Long & Smyser* v. *Hawthorne, supra*; *Wilson* v. *Ralph, supra.* A blank indorser of a non-negotiable note has the same liability as the maker thereof. *Allison* v. *Hollembeak,* 138 Iowa 479, 114 N. W. 1059. The holder can recover from the remote as well as immediate indorsers. *Huse* v. *Hamblin,* 29 Iowa 501.

Since a blank indorsement has been considered an authority to fill in the blank, parol evidence is admissible to show what was intended to be placed in the blank, for to fill it in contrary to the agreement would be fraud. *Harrison* v. *McKim,* 18 Iowa 485; *James* v. *Smith,* 30 Iowa 55. However, such evidence is admissible only against the original parties to it, or remote indorsees with notice. *Skinner* v. *Church,* 36 Iowa 91.

For a fuller discussion and collection of cases on the subject of non-negotiable notes, see the article, "Nonnegotiable Bills and Notes" by Herbert F. Goodrich, 5 IOWA LAW BULLETIN 65, especially on pages 80 and following, which deal with this point.

EVIDENCE UNLAWFULLY OBTAINED—CONSTITUTIONAL PROHIBITION OF SEARCHES AND SEIZURES.—Private detectives, hired by a private citizen, broke into and searched petitioner's office. They stole his private papers and turned them over to appellant, the local United States attorney. He knowing the papers to have been stolen, holds them for use in prosecuting petitioner on a charge of fraudulent use of the mails. Held, the fourth amendment to the federal constitution, prohibiting unreasonable search and seizure, applies solely to seizure by government officials. The fifth amendment, that a person shall not, in a criminal case, be compelled to be a witness against himself, does not apply where the papers have come into possession of the government without violation of petitioner's rights by governmental authority. Mr. Justices Brandeis and Holmes dissented on the ground that the government attorney did not take proper steps to make his retention of the papers rightful. *Burdeau* v. *McDowell,* (1921) 41 Sup. Ct. Rep. 574.

Both of these amendments to the federal constitution relate to the personal security of the citizen. It has been said that "They nearly run into and throw light upon each other." *Boyd* v. *United* States, (1886), 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. As a matter of fact, however, much confusion has resulted from

this attempt to fuse two distinct ideas into one. Since the criminal law will punish the theft, the main question is whether a man's constitutional rights are invaded when the government retains the stolen papers for use against him. Is he thereby compelled to be a witness against himself? Apart from this, should such a method of law enforcement be checked by the courts on grounds of public policy?

The general rule is that a criminal court will not permit a collateral issue to be raised with respect to the source of competent evidence. GREENLEAF ON EVIDENCE (*Lewis's* ed.) Vol. I, sec. 254a, *Adams* v. *New York*, (1904), 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372. Thus the court will neither approve nor disapprove, but will simply ignore, the fact that the evidence was obtained by deception, breach of confidence, or other dishonest or dishonorable means. WIGMORE ON EVIDENCE, sec. 2183. But if the method used in procuring the evidence amounts to a violation of the constitutional privilege against unlawful searches and seizures, such evidence, even though otherwise competent, must be returned on motion before trial. *Weeks* v. *United States* (1913), 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341 Ann. Cas. 1915C, 1117. To this extent, the source of evidence must be inquired into upon proper objection during the trial. *Gouled* v. *United States* (1921), 41 Sup. Ct. Rep. 261. Inconvenient though this inquiry may be, it is the most effective mode of giving effect to the constitutional privilege. But see WIGMORE ON EVIDENCE, sec. 2264.

The fifth amendment provides a constitutional sanction for the common law privilege against self-crimination. WIGMORE, EVIDENCE, sec. 2252; see *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 Sup. Ct. Rep. 195. The policy back of this privilege is to protect innocent persons against persecution. WIGMORE, EVIDENCE, sec. 2251. The manner in which this protection is secured is thus stated: "Such, too, is the inference from the policy of the privilege as a defensible institution (2251); that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions." WIGMORE, EVIDENCE, sec. 2263. It is readily apparent, then, that the use of evidence stolen by a private citizen does not come within the pale of the fifth amendment. The accused, in such a case, is no more compelled to give evidence against himself than he is forced to incriminate himself when the prosecution uses his prior inconsistent statements to impeach him.

The dissenting view in the principal case would add a dangerous pitfall to law enforcement, for in effect it would set up a new privilege based upon property rights. The chief objection of the dissenting judges was to the procedural irregularity of the district attorney's retaining the papers without subpoena or other process. It is, however, difficult to see the procedural irregularity in a fail-

ure to obtain a subpoena for evidence already in the possession of the government. The dissent then closes with this significant sentence: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." This ethical statement is without doubt absolutely sound. But would not its application to such a case as this be cause for great jubilation among criminals, since the innocent man is already protected by the constitutional privilege? Mr. Justice McKenna, in *Perlman* v. *United States,* (1918) 247 U. S. 7, 62 L. ed. 950, 38 Sup. Ct. Rep. 417, said: "But Perlman insists that he owned the exhibits and appears to contend that his ownership exempted them from any use by the government without his consent. The extent of the insistence is rather elusive of measurement. It seems to be that the owner of property must be considered as having a constructive possession of it wherever it be and in whosoever hands it be, and it is always, therefore, in a kind of asylum of constitutional privilege. And to be of avail the contention must be pushed to this extreme. It is opposed, however, by all the cited cases. They, as we have said, make the criterion of immunity not the ownership of property but the 'physical or moral compulsion' exerted." To sum up the objection of the dissent, should the innocent public be injured by permitting a criminal to go free simply because the prosecutor retains evidence stolen by private parties for use in convicting him?

INCOME TAX—TAXATION OF DIVIDENDS IN THE FORM OF STOCK IN ANOTHER CORPORATION.—The claimant held two hundred fifty shares of stock of the E. I. du Pont de Nemours Powder Company, a New Jersey corporation. The Company having acquired a large surplus of accumulated profits, a plan of financial readjustment was resolved upon and carried into effect with the assent of a sufficient number of stockholders. Under this plan a new corporation was formed under the laws of the state of Delaware. The older corporation transferred to the new one practically all its assets, including good will. In consideration of this transfer the Delaware corporation assumed the obligations of the New Jersey corporation, with the exception of the funded debt, and in addition transferred to the latter twice as many shares of its common stock as there were outstanding shares of common stock of the New Jersey corporation. Pursuant to this plan of readjustment the New Jersey corporation handed over to each of its common stockholders, (the preferred stock having been retired), twice as many of the Delaware shares as he held of its own shares. Consequently the claimant received as dividend five hundred shares of stock of the new corporation. The defendant claimed the right to assess the shares received at their market value and collect an income tax upon the same. The claimant paid the tax under protest and later brought action to recover the amount paid. Held, that the shares of stock acquired by the claimant were taxable under the income tax law. *United*

States v. *Phellis,* U. S. Sup. Ct. Adv. Op., 1921-1922, p. 69, 66 L. ed. —, 41 Sup. Ct. 574.

The Court held in *Eisner* v. *Macomber,* 252 U. S. 189, 64 L. ed. 521, 40 Sup. Ct. Rep. 189, that a stock-dividend was not subject to an income tax under the taxing statute, Act of Oct. 3, 1913, chap. 16, U. S. Comp. Stat. sec. 5291, which provides that income shall include among other things gains derived "from interest, rent, dividends, securities, or the transaction of any lawful business, carried on for gain or profit, or gains and profits, and income derived from any source whatever." The ground of this decision was in brief that a stock-dividend was really not a dividend in the sense that the word is used in the taxing statute since the holder of the stock stands in the same position that he occupied before the issue of such stock-dividend. In taking this view of the situation the Court followed the same line of reasoning that was followed in *Towne* v. *Eisner,* 245 U. S. 418, 62 L. ed. 372, 38 Sup. Ct. 158, where it was held, "that a stock-dividend really takes nothing from the property of the corporation and adds nothing to the interests of the stockholders. Its property is not diminished and their interests are not increased. The only change is in the evidence that represents this interest of the stockholder. New shares and old shares represent together the same proportional interest that the original shares represented before the issue of the new ones."

On the other hand the Supreme Court held in *Peabody* v. *Eisner,* 247 U. S. 347, 38 Sup. Ct. 546, 62 L. ed. 1153, that where shares of stock in another corporation were distributed as dividends, such shares were taxable under the statute heretofore referred to. It appears that there is a fundamental distinction between the two cases. Where the shares distributed are those of another corporation, the stockholder receiving those shares has received something that might properly be said to have been received in the way of income. He still retains his original capital which is no more nor less than the potential right to share in the distribution of the corporate profits or in the corporate property upon distribution, *Gibbons* v. *Mahon,* 136 U. S. 549, at 560, 34 L. ed. 525, 10 Sup. Ct. 1057, and in addition has the shares of stock in the other corporation. He can deal with these shares without touching his capital interest.

The principal problem presented by the instant case is to determine whether the situation is like the one in *Macomber* v. *Eisner,* or like the one in *Peabody* v. *Eisner.* Considering the case from the purely technical viewpoint the principal case appears identical upon the facts to that of the Peabody case. After the receipt of the shares of stock in the Delaware corporation, the shareholder of the New Jersey corporation would still have his original capital, the potential interest in the New Jersey corporation, and in addition would have something entirely separate and apart from that interest which he had received as income upon that investment, namely, the shares of stock in the new corporation. Considering the Dela-

ware corporation as a separate legal entity the result reached in the principal case was properly the same as in the Peabody case.

The argument was made by Justice McReynolds in his dissenting opinion that since the transaction was merely the means of affecting a reorganization of the corporate business and there was no change either in the personnel of stockholders or officers, the two corporations were practically identical and hence there was no distribution in the form of income. Granting that the court should go behind the form of the organization in order to determine whether a stockholder has received an income, the opinion of the majority of the court that the two corporations were not identical seems sound. The argument to the effect that the personnel of stockholders and officers remained the same is not at all conclusive. The personnel of one corporation might be changed at a later date without a corresponding change in the other. The same might be said concerning the corporate purposes which happened for the time being to be the same. Further it is to be noted that the new corporation was organized under the laws of a different state and hence subject to regulations different from that under which the old corporation operated. In addition the authorized capital stock of the Delaware corporation was nearly four times as great as that of the New Jersey corporation. Taking all these facts into consideration it appears that the Court could go behind the mere form of the reorganization and yet properly say that the two corporations were not identical. Therefore, there was nothing to take the case out of the operation of the rule previously laid down in *Peabody* v. *Eisner*.

LIBEL AND SLANDER—EVIDENCE OF DEFENDANT'S REPUTED WEALTH INADMISSIBLE TO PROVE ACTUAL DAMAGES.—In an action for slander the plaintiff introduced evidence that the defendant was reputed to be worth $30,000 to $50,000, and of his standing and influence in the community. Held, that proof of defendant's reputed wealth was inadmissible, but that the evidence of his standing and influence in the community was admissible as bearing on the actual damage done. *Sclar* v. *Resnick*, 185 N. W. 273. (Iowa Sup. Ct.)

It is the universal rule that evidence of the defendant's reputation and standing in the community is admissible to show the amount of actual damage done. 25 Cyc. 507. It is evident that if the defendant enjoys a favorable reputation for trustworthiness, if the community places faith in his judgment and opinion, any disparaging remarks made by him will do greater damage than the same remarks made by a person in whom the community has little or no faith or confidence.

The majority rule is that evidence of the defendant's reputation for wealth is admissible in a slander suit on the theory that the remarks of a man of wealth will cause greater actual damage to the plaintiff, than those of an unknown or obscure person. 25 Cyc. 508. The evidence is admissible to prove standing and influence on the hypothesis that the richer a man is, the better is his standing and the greater his influence. The actual wealth of the defendant can-

not be shown. *Enos* v. *Enos,* 58 Hun 45, 11 N. Y. Supp. 415; *Stanwood* v. *Whitmore,* 63 Me. 209; *Farrand* v. *Aldrich,* 85 Mich. 593, 48 N. W. 628. Some states allow reputation evidence of wealth against individuals, but not against corporations, since there is no presumption that influence increases proportionately with wealth in the case of corporations. *Randall* v. *Evening News Ass'n,* 97 Mich. 136, 56 N. W. 361, 7 Harv. L. R. 308; *Robinson* v. *Eau Claire Book & Stationery Co.,* 110 Wis. 369, 85 N. W. 983. But in others it is equally admissible against both. *Tingley* v. *Times Mirror Co.,* 151 Cal. 1, 89 Pac. 1097; *Sotham* v. *Drover's Telegram Co.,* 239 Mo. 606, 144 S. W. 428. Iowa followed the majority rule as to reputed wealth of an individual defendant, from the time of *Karney* v. *Paisley,* 13 Iowa 89, (1862) until the instant case, which overruled the preceding cases and decided that the evidence was inadmissible, thus adopting the minority rule as expressed in *Naylor* v. *Ponder,* 1 Marv. (Del.) 408, 41 Atl. 88; *Morris* v. *Barker,* 4 Har. 520; *Ware* v. *Cartledge,* 24 Ala. 622, 60 Am. Dec. 489; *Donaldson* v. *Robertson,* 15 Ala. App. 354, 73 So. 223; *Young* v. *Kuhn,* 71 Tex. 645, 9 S. W. 860; *King* v. *Sassaman,* 64 S. W. (Tex.) 937. The reasons for the minority rule are that such evidence tends toward collateral issues and is likely to confuse and unduly prejudice the jury, and that it is immaterial since the fact that a man is wealthy does not necessarily increase the amount of damage his words will do. These reasons are well expressed in the opinion. 185 N. W. 277, 278.

The rule is different as to punitive damages, since there the object is not only to compensate the plaintiff for the actual damage done, but also to punish the defendant for his malice. It is apparent that what would be great punishment to a man of limited wealth would not punish a richer man. Therefore, in these cases evidence of the defendant's actual wealth is admissible to show how large a judgment would be required to inflict the desired punishment, *Weiss* v. *Weiss,* 112 Atl. (N. J.) 184. This point is not involved in the principal case.

The point of admissibility of evidence of defendant's wealth in slander cases is annotated in 61 Am. Dec. 100n; 67 Am. Dec. 565n; 71 Am. Dec. 252n; 44 L. R. A. (N. S.) 355n; Ann. Cas. 1915B 1158n.

PLEADING AND PRACTICE—DEMURRER OVERRULED DOES NOT BECOME "THE LAW OF THE CASE."—In the trial of a case, defendant demurred to plaintiff's amended petition, basing his demurrer upon the statute of limitations. The judge overruled the demurrer. Defendant then answered, setting up, among other defenses, that plaintiff's action was barred by limitation. Plaintiff's motion to strike defendant's answer was overruled. Held, that the motion was properly overruled. The overruling of defendant's demurrer to plaintiff's petition did not preclude defendant from raising the same issue by answer. The ruling on the demurrer did not become the law of the case. *McCord* v. *Page County,* 184 N. W. 625 (Iowa Sup. Ct.).

It seems that the early Iowa rule was that the ruling on the demurrer, in such cases, did become the law of the case. Thus, in a case where defendant's demurrer was overruled and he set up the same defense in his answer, the court said: "The very facts pleaded in the answer of defendant had been held.....upon a demurrer to the petition, as an insufficient defense.....The court having held upon the first demurrer that the defense pleaded was not good, was required to regard the questions raised by the answer as settled against defendant." *Kissinger* v. *The City of Council Bluffs,* 73 Iowa 171, 34 N. W. 801 (1887). But a statute, enacted in 1894, seems to have changed this rule. By this statute it is provided: "When a demurrer shall be overruled and the party demurring shall answer or reply, the ruling on the demurrer shall not be considered as an adjudication of any question raised by the demurrer; and in such case the sufficiency of the pleading thus attacked shall be determined as if no demurrer had been filed." Laws of 1894, ch. 96; Sec. 3564, Code of 1897; Sec. 7210, Code of 1919. That the purpose of this act was to abolish the old rule that defendant, by answering over, waived his right to subsequently raise the question involved in the demurrer is, at least, very probable, for in this same act of 1894, Sec. 2650, Code of 1873, which provided: "When any of the matters enumerated as grounds of demurrer do not appear on the face of the petition, the objection may be taken by answer. If no such objection is taken, it shall be deemed waived," was amended by striking out the words, "If no objection is taken, it shall be deemed waived." The opinion of the Supreme Court, in construing this act of 1894, very soon after its passage, is to the same effect. The court said: "It (Laws of 1894, ch. 96) was not designed to permit a review of the ruling on a demurrer which had been overruled, where the party demurring had afterwards filed an answer or reply, but to provide that the ruling should not have the effect of an adjudication, and to permit the party demurring unsuccessfully to question the sufficiency of the pleading in other ways during the progress of the trial, as by a motion to direct the verdict or in arrest of judgment.....The party waived his right to complain of the overruling of his demurrer by pleading over, but did not waive his right to attack the pleading on the grounds upon which his demurrer was founded at any subsequent time in the progress of the case." *Frum* v. *Keeney,* 109 Iowa 393, 397, 80 N. W. 507 (1899). But if the demurrer is overruled and the party demurring pleads over, the question raised by the demurrer, tho not adjudicated by the ruling thereon, cannot be subject of review on appeal unless again properly raised by the answer or otherwise during the proceedings in the trial court. *Buchanan* v. *Black Hawk Coal Works,* 119 Iowa 118, 93 N. W. 51. But if the question of the demurrer is raised again by the answer, or at any subsequent stages of the proceeding in the trial court, the party demurring retains his right, on appeal, to complain of any error, if any was committed, in overruling his demurrer. *Back* v.

Back, 148 Iowa 223, 125 N. W. 1009; *McClain* v. *Capper,* 98 Iowa 145, 67 N. W. 102; *Geiser Mfg. Co.* v. *Krogman,* 111 Iowa 503, 82 N. W. 938; *Marshall Ice Co.* v. *La Plant,* 136 Iowa 621, 111 N. W. 1016; *Watkins* v. *Cent. R. Co.,* 123 Iowa 390, 98 N. W. 910; *Buffalo Center, etc. Co.* v. *Swigert,* 176 Iowa 422, 156 N. W. 701. The question of the overruled demurrer may be raised immediately in the answer, *Watkins* v. *Cent. R. Co., supra; Matthys* v. *Donelson,* 179 Iowa 1111, 160 N. W. 944; *Wheeler v. Schilder,* 183 Iowa 623, 167 N. W. 534; or subsequently in the form of an objection to the admission of evidence, *Back* v. *Back, supra;* or of a motion for a directed verdict, *Littleton* v. *People's Bank,* 95 Iowa 320, 63 N. W. 666; *McClain* v. *Capper, supra;* or by a motion in arrest of judgment. *Buchanan* v. *Black Hawk Coal Works, supra* (*semble*).

It seems that the Iowa court places the only legitimate construction upon the statute defining the effect of overruling a demurrer; and that the rule thus evolved is a most salutary one. If defendant stands on his overruled demurrer, he takes a desperate chance. If the Supreme Courts affirms the decision of the trial court, the judgment will be final against defendant; but if it reverses the decision, defendant will gain but little, for the plaintiff will be permitted to amend. The only fair rule is to allow the defendant whose demurrer is overruled either to answer over, setting out the facts which will bring up the objections raised in his demurrer, together with any other defenses he may have; or to raise the objection made by the demurrer at subsequent stages of the proceedings in the trial court with the assurance that if any error in law was committed in the ruling on demurrer, this, as well as any subsequent errors, will be the subject of review in the Supreme Court. Under such a rule, the party is not bound to stand upon any one defense or claim; but may present all of his defenses or claims before the Supreme Court at the same time. The act of 1894 did not, however, abolish the peculiar Iowa doctrine that an objection to the sufficiency of the petition cannot be raised for the *first time* on appeal. *Ruddick* v. *Patterson,* 9 Iowa 103 (1859); *Buchanan* v. *Black Hawk Coal Works, supra.*

WOMEN AS JURORS—NINETEENTH AMENDMENT SELF-EXECUTING. —Defendant was convicted of the crime of breaking and entering. On appeal he predicated as error, *inter alia,* the fact that the jury lists and the panel were "composed of the names of men and women indiscriminately, contrary to law." Held, since the adoption of the nineteenth amendment, to the federal constitution, women are eligible to jury service in Iowa. *State* v. *Walker,* 185 N. W. 619.

The consideration of this objection raised two points: First, what force had the nineteenth amendment? and secondly, what was its effect upon jury lists? With regard to the first point the court held that it was a self-executing provision. The general rule is that constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right

given, or the enforcement of a duty imposed. *Davis* v. *Burke*, 179 U. S. 399; *Tampa Water Works Company* v. *Tampa*, 199 U. S. 241; *Lyons v. Longmont*, 54 Colo. 112. Then there is the further rule that prohibitive provisions are self-executing. *Halsey* v. *Belle Plaine*, 128 Iowa 467. The United States Supreme Court, apparently, reached a contrary result in *Graves* v. *Slaughter*, 15 Pet. (U. S.) 449. The object of the nineteenth amendment was to eradicate an existing mischief, being in this respect similar in its operation to the fifteenth amendment, which was declared to be self-executing. *Guinn* v. *United States*, 238 U. S. 347. Applying then the general rules of construction and comparing it to the fifteenth amendment there would seem to be no doubt that this nineteenth amendment was self-executing. The direct effect would be to render nugatory, *pro tanto*, federal or state, laws, and conflicting provisions of state constitutions. *Chew Heong* v. *The United States*, 112 U. S. 536. Thus in Iowa it had the effect of striking from Art. 1 Sec. 2 of the Constitution the word "male," leaving it to read "Every citizen . . . of the age of twenty-one years . . .."

With regard to the second point raised the Court held that the amendment had the effect of making women subject to jury service. Sec. 332 of the Code provides that "All qualified electors . . . are competent jurors . . .," and therefore as women are made electors by the nineteenth amendment, they are made competent for jury service by Sec. 332. *Neal* v. *Delaware*, 103 U. S. 370. The privilege of suffrage does not necessarily carry with it the duty of jury service. *Garrett* v. *Weinberg*, 54 S. C. 127. The legislature has the right to prescribe by statute the qualifications which jurors must possess, *In re Shibuya Jugira*, 140 U. S. 291, except where expressly restricted by the Constitution of the state or by Federal statutes, *Neal* v. *Delaware, supra; Strauder* v. *West Virginia*, 100 U. S. 303. Where the qualifications for jurors have been similar to those of Iowa subsequent amendments granting women suffrage have been held to qualify them for jury service. *Commonwealth* v. *Maxwell*, 114 Atl. 825, (Pa.); *People* v. *Barltz*, 180 N. W. 423, (Mich.); *Parus* v. *Dist. Ct.*, 42 Nev. 229. In other states where the question has arisen, the result has been to exclude women, but always there has been an impediment to be found in the statute defining qualifications for jury service, such as "men" etc., that caused the court to decide that women were not qualified. *In re Opinion of the Justices*, 130 N. E. 685. (Mass.); *In re Grilli*, 179 N. Y. Supp. 795. For a further consideration of these cases see 70 University of Pennsylvania Law Review, 30. The instant case is one of the pioneers in this matter and the result is in line with the apparent intent of the legislature to make those citizens who exercise the privilege of voting bear the burden of jury service. It is submitted that the exhaustive opinion of the Iowa Court reaches a commendable conclusion.

BOOK REVIEW

PATENT LAW, by John Barker Waite, Professor of Law in the University of Michigan Law School. Princeton University Press, Princeton, N. J. 1920.

It is unfortunately true that too many men have too exalted an idea of a patent for invention, while others go to the opposite extreme and declare that no patent is any good. Now in truth, patents, like automobiles, come in a great variety of models and styles. There is real need for information, that will enable the public to know what makes for quality and strength in patents.

This need, Professor Waite seeks to supply in his book, which readably explains what may be patented, who may have a patent, how the patent may be obtained, lost, transferred and defended.

The author states that he has written for laymen and general practitioners, and therein compliments such readers, for the book goes too deeply into the principles underlying patent law and into the philosophy of inventions to be comfortable reading for any but a very close reader.

It has much meat for the patent specialist and students of the patent system. While Professor Waite's book is not as full as texts by Robinson and Walker, it is clear and accurate and in many instances suggestive of new view points, which give valuable light, especially on certain subjects where the text writers and courts have adopted a phraseology not wholly satisfactory to anyone.

In this connection may be noted his treatment of the patentability of laws of nature, and his suggestion that a mental process, requiring no instrumentalities for its performance, is a patentable art.

While the author does not often or widely disagree with other text writers or the courts, his disagreements, where they occur, are frank, clear and logical.

The work gives ample evidence of independent thought and keen critical analysis and discrimination.

W. P. BAIR.

DES MOINES, IOWA.

IOWA LAW BULLETIN

Volume VII MAY, 1922 Number 4

THE NATIONAL CONFERENCE OF BAR ASSOCIATION DELEGATES

The Washington Meeting

The recommendations of the American Bar Association, adopted at its annual meeting in September, 1921, as to the requirements for admission to the bar, were endorsed by the National Conference of Bar Associations, in a special session held in Washington, D. C., on February 23 and 24, 1922.[1] The endorsement was accompanied by some explanations which did not substantially alter the tenor of the requirements approved by the American Bar Association.[2] Briefly summarized, these requirements are that every candidate for admission to the bar should be a graduate of a law school which (1) requires two years of college work for entrance into the law school; (2) requires for graduation full-time law study for a period of three years, or part-time study for a longer period; (3) provides an adequate library for students; (4) has a sufficient number of full-time teachers to insure personal contact between faculty and students. Graduation from a law school is not to be a substitute for, but is in addition to, the passing of bar examinations given in the usual way.

The National Conference of Bar Associations adopted these resolutions only after a full discussion, in which the arguments *pro* and *con* were earnestly debated.[3] The meeting was well attended. Forty-four state bar associations had one or more delegates in attendance, and three others—Georgia, Montana, and Washington—named delegates, who, so far as the record shows, did not attend. Each state bar association was entitled to three delegates; the American Bar Association sent five delegates, besides four alternates; and each local (county or city) bar association, was allowed to send two delegates. One hundred and sixty-two of such local bar associations displayed sufficient interest in

[1] See 7 Iowa Law Bulletin 163.

[2] The full text of the resolutions was given in the March number of the Bulletin. (7 Iowa Law Bulletin 163.) For the convenience of readers, these resolutions are reprinted in full *infra*, p. 229.

[3] A summary of the proceedings is given below, p. 195. Some of the speeches and remarks, *pro* and *con*, are given *infra*, pp. 204 to 229.

the meeting to appoint delegates. The official list shows that 118 such local associations, scattered from Maine to California, had a delegate or delegates actually in atttendance. Representatives of the District of Columbia bar association, of three Canadian bar associations, of the Far Eastern Bar Association (China) and of twenty-seven universities and law schools, were also present. In all, some 400 delegates, alternates and representatives were present.

The National Conference of Bar Associations was formed in 1915 as the result of action taken by the American Bar Association. During the winter of 1921, a special committee of the Section on Legal Education of the American Bar Association, acting in accordance with instructions, made a thorough study of legal education, and reported to the American Bar Association the resolutions which were adopted by that body. Mr. Elihu Root was chairman of that committee and took an active part in framing its report. The other members of this committee were: Hugh H. Brown, Tonopah, Nev.; James Byrne, New York, N. Y.; William Draper Lewis, Philadelphia, Pa.; George Wharton Pepper, Philadelphia, Pa.; George E. Price, Charleston, W. Va.; and Frank H. Scott, Chicago, Ill.

The American Bar Association, in adopting these recommendations at its meeting in Cincinnati on September 1, 1921,[3a] directed the Council on Legal Education to send out a call for a conference on legal education, to which state and local bar associations should be invited to send delegates, "for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles above set forth." Pursuant to this resolution, Mr. Root, as chairman of the section, addressed letters to the presidents of state and local bar associations, inviting them to send delegates.

The delegates from Iowa in attendance were: Iowa State Bar Association,[4] Herbert F. Goodrich,[5] H. C. Horack;[6] Des Moines Bar Association, Jesse A. Miller;[7] Polk County Bar Association,

[3a] The resolutions of the American Bar Association, in full, are given in Mr. Root's address, *infra*, p. 205.

[4] Mr. Justice F. F. Faville, of the Supreme Court, was named as a delegate but was unable to attend.

[5] Professor of Law, and Acting Dean of the College of Law, State University of Iowa.

[6] Professor of Law, State University of Iowa.

[7] President of the Iowa State Bar Association.

Jesse A. Miller,[7] C. J. Hilkey;[8] Sioux City Bar Association, G. T. Struble.[9]

A complete report of the proceedings and discussion has been printed. Copies may be obtained from Mr. W. Thomas Kemp, Secretary, American Bar Association, 901 Maryland Trust Building, Baltimore, Maryland, for a small sum. It is well worth the time of every lawyer to read the thorough discussion of these important questions. The report contains 211 printed pages. The limited space of the BULLETIN makes it impossible to present here the complete record. For the information of readers who do not have the complete report, a concise summary will be given of the proceedings. Following this will be found what are believed to be the more representative and outstanding addresses or remarks on both sides of the question.

SUMMARY OF PROCEEDINGS

The conference met in Memorial Continental Hall, in which the recent Disarmament Conference was held. The meeting was called to order by Judge Clarence N. Goodwin, of Chicago, as chairman of the Conference of Bar Association delegates. Judge Goodwin introduced the topics for discussion, pointing out their importance to the profession, and their significant bearing upon the other proposals for reform of the American Bar Association, all made with the object of eliminating the incompetent and untrustworthy from the practice of law. He emphasized that as a whole the bar is composed of high-minded and intelligent men, but it suffers in public esteem from the incompetence and misconduct of a few of its members. He urged that lawyers are public officials of the court, commissioned by the state; that the rich and powerful are represented by the highly educated, thoroughly trained and most competent members of the profession, while the poor and ignorant are often represented by ignorant, untrained and incompetent men who have, through the laxity of present methods of admission, been commissioned by the state; that this was a denial of that equality before the law to which every man is entitled. He spoke from his experience as an appellate court judge, that many miscarriages of justice resulted from the ignorance or incompetency of counsel.

[7] Dean of the Law School of Drake University.

[8] Of the Sioux City Bar.

On motion, the roll call was dispensed with. The chairman announced that the representative of the Canadian Bar Association, and the representatives of law schools, while not entitled to vote on any questions, would be extended the privileges of the floor. The chairman then introduced Hon. Elihu Root.

Mr. Root pointed out that the resolutions were the result of many years of discussion, of committee reports, of drafts in the American Bar Association, and were based upon the results of a thorough questionnaire which was sent out to the heads of all state and local bar associations, to all the law schools, and to a great many leaders of the bar in different parts of the country, which was followed by a thorough hearing and discussion before the committee. He expressed the feeling that the bar was being discredited in the eyes of the public, and that something had to be done. His experience as a member, for many years, of the Character Committee of the Supreme Court of New York, for New York City, engaged in passing upon the character of each applicant for admission to the bar, convinced him that such a safeguard was ineffective to exclude the untrustworthy applicant. Conditions in law offices have changed, he said, so that law office study today is by no means the training that it was in Lincoln's day. He urged that two years in college would give the right mental and moral preparation for entering upon the study of law, and warmly urged the adoption of the resolutions.[11]

At the afternoon session, the chairman of the session was Chief Justice William H. Taft, of the United States Supreme Court, who spoke briefly in favor of the resolutions. Mr. Justice Taft spoke of the need for intellectual ability and reasoning powers, as well as for a wide and thorough general education.[12]

The program of the meeting called for a series of addresses on particular questions involved in the proposed resolutions, to be followed at the close of each address, by general discussion. The first of these addresses was given by Professor Samuel Williston, of the Harvard Law School, who spoke on "The Justification of Requiring Two Years of College Training in View of the Technical Education Necessary to Make an Efficient Lawyer." Professor Williston pointed out that the task of securing a mastery of the law is much greater than it was a half century ago; there are more law reports in English printed since 1885 than were printed prior

[11] Mr. Root's address given, *infra*, p. 204.

[12] Mr. Taft's remarks printed, *infra*, p. 212.

to that year from the beginning of English law reporting. He urged that the study of reported cases in law school demanded a broad preliminary education. He stated that today a large proportion of the leading law schools require as much as two years of college work for admission, while thirty years ago not a single school had this requirement. He gave statistics from the records of the Harvard Law School when a college degree was not required for admission, showing that, during the years 1892-96, the college graduates in the first-year class made grades on an average of seven to eight per cent higher than non-graduates (who were required to pass an entrance examination in Latin, French, and Blackstone).

Chairman Taft then introduced Governor Samuel M. Ralston, of Indiana, who spoke briefly in opposition to the requirement of two years of college work. He said he believed that a college education would enable a law student to make better progress in his legal studies, and would add to his equipment as a lawyer, but he urged that a boy who was mentally equipped for admission to the bar should not be excluded because he lacked the college training. He argued that such a requirement would exclude poor boys, or would impose severe hardships on them. He urged that it is average, not exceptional, lawyers, to whom the people can look with the greatest confidence.[18]

Hon. Herbert S. Hadley, professor of law in the University of Colorado, and formerly governor of Missouri, spoke in favor of the resolutions. He said that more lawyers are being turned out today than are needed; even at the University of Michigan, some years ago, it was found that, ten years after graduation, less than one graduate in five was making his living by the practice of law. The controlling theory, he said, should be the welfare of the profession and the proper administration of justice. He pointed to many signs of the need for thorough reform. In his experience as prosecuting attorney, Attorney General of Missouri, and Governor with pardoning power, he was convinced that in two-thirds of the criminal cases in which he had had actual experience, perjured testimony was offered by the defense.

The second topic on the program was "The Effect of College Experience and Training in Developing the Desire and Ability to Understand and Maintain High Ideals of Professional Conduct." The discussion was introduced by Mr. Silas Strawn, of the Chicago,

[18] Governor Ralston's remarks are given, *infra*, p. 215.

Illinois, bar, who stated that, as a result of thirty years' experience at the bar, during which time he had directed the work of an average number of twenty-five lawyers of different degrees of education, both preliminary and legal, he was convinced that the college-trained men demonstrated not only greater mental efficiency, but also higher moral conceptions and a keener appreciation of the ideals of the profession.[14]

The next topic was: "Economic Conditions and Educational Opportunities in the United States for Students of Slender Means Desiring to Obtain a Legal Education Requiring at Least Two Years of College Training." Dr. James B. Angell, President of Yale University, introduced the topic. He felt it was no exaggeration to say that no intellectually competent lad, who enjoys moderate physical health, need be debarred from a collegiate education, if he is really eager to secure it; but that the student who worked his way through college was often obliged to sacrifice social relationships and extra-curricular activities, and to undergo considerable hardship. He pointed out that, while in many institutions scholarships and loan funds were available for a limited number of exceptional students, the amount of such funds was wholly inadequate to meet the present needs and that the probable result of requiring two years of college work would be to exclude altogether from the study of law a considerable proportion of the students now in law schools which do not make such a requirement. He stated that all colleges and universities are earnestly striving to aid the poor boy of character and ability, but they have not fully succeeded in solving the problem.[15]

Dean Harlan F. Stone, of the Columbia University Law School, with about 700 students, said his school annually distributes about $12,000 in scholarship aid to needy students, and that fully one-third of the students maintain themselves fully or in part either by their own earnings or by scholarship aid and loan funds.

Mr. William B. Hale, of Illinois, read statistics, based on answers received from 1,064 of the 1,900 men and women admitted to the Illinois bar in the last two years, showing that forty-five per cent of this 1,064 were of foreign-born parentage. Sixty per cent of those answering had wholly supported themselves while studying law, and twenty-six per cent supported themselves partially. His

[14] Mr. Strawn's remarks are printed, *infra*, p. 218.

[15] President Angell's address gave statistics of tuition costs at leading colleges and law schools.

conclusion was that we need have no fear that the poor boy would be excluded from the bar.

Mr. Julius Henry Cohen, of New York City, urged that the bar could not consistently insist upon the strict enforcement of the requirement that title and trust companies, notaries public, and other unlicensed practitioners shall not practice law, without taking steps to assure the public that those who are licensed to practice are competent.

Mr. John Lowell, of Massachusetts, for twenty-five years treasurer of the Harvard Loan Fund, stated that Harvard could help the poor, deserving boy to secure two years of college training.

Professor John B. Keeble, of Tennessee, Dean of the Vanderbilt University Law School, asserted that the proposed requirements would disqualify every member of the Supreme Court of the United States, every member of the Supreme Court of Tennessee, and ninety per cent of the American Bar Association. He predicted that the legislature of Tennessee would refuse to adopt the proposed requirements. In fifty per cent of the county seats in Tennessee, the practice of law does not call for any such learning. He argued that the educated members of the bar had contributed their part toward losing the public confidence, by accepting retainers from corporate interests.[16]

Professor I. Maurice Wormser, of the Fordham University Law School, favored the proposed requirements, although the law school in which he is teaching does not require two years of college work for admission. He asserted that a study of the records of the Appellate Divisions of the New York courts, shows that uniformly it is the uneducated, the illiterate, and, more particularly, the immigrant lawyer, with whom we have difficulty. He maintained that if Abraham Lincoln were alive today, he would have a college education. He further urged that certain specific subjects—rhetoric, English and American history, logic, and Latin—should be required in the two years of college work.

Mr. Thomas Dawson, of Maryland, opposed the requirements, arguing that a complete and searching bar examination would test the educational qualifications of an applicant, no matter how he obtained them, and that educational requirements would not assure men of high character. He thought the proposals undemocratic and un-American, and pointed out that neither John Mar-

[16] Dean Keeble's remarks are printed, *infra*, p. 220.

shall,[17] Lincoln nor Washington had college training. These requirements would exclude the poor boy, he asserted.

Mr. J. Nelson Frierson, of South Carolina, a practicing attorney and a teacher in the law school of the University of South Carolina, thought there was no logic whatever in the argument about a poor boy being kept out; that the argument that the rights of the individual are superior to rights of society today is not entitled to any notice whatever. Society, he said, is entitled to be protected against the inefficient and incompetent lawyer. John Marshall and Abraham Lincoln, he maintained, would secure a college education if they were living in this day.

Mr. Rowland Taylor, of Idaho, said that about eighty per cent of the legislators in Idaho are farmers, and that he believed they wanted the best obtainable in the line of lawyers. He favored the proposals.

Mr. John B. Sanborn, of Wisconsin, stated that, having been a bar examiner, he knew that no bar examination had ever been devised which could not be passed by proper cramming in a very brief period. This was in answer to Mr. Dawson's argument.

Mr. W. A. Hayes of Wisconsin spoke favorably on the resolutions.

Mr. J. Zach Spearing, of Louisiana, argued that no attempt was being made to rule out of the legal profession or off the bench those who (like himself) by reason of not having had an opportunity in the past, have had to acquire their training and legal education without the schooling which it is proposed to require; and that the lawyers should progress and keep up with the medical profession.

The Conference reassembled at 8:30 in the evening. Mr. Hampton L. Carson, of Philadelphia, presided, and introduced the speaker, Dr. William H. Welch, Director of the Department of

[17] In "The Life of John Marshall," by Albert J. Beveridge, Vol. I, p. 154 it is stated that John Marshall attended law lectures at William and Mary College for six weeks. The full period of instruction then offered in law seems to have been " a few months." *Ibid.* "The college was all but deserted at that time and closed entirely the year after John Marshall's flying attendance," *Ibid.* p. 155. Marshall "could have continued to attend for several weeks after he left in June, 1780, for student John Brown's letters show that the college was still open on July 20 of that year." *Ibid*, p. 161, N. 2. The earliest recorded law degree in the United States was conferred at William and Mary College in 1793. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (Carnegie Foundation, 1921) p. 117. —ED.

Hygiene and Public Health of Johns Hopkins University, who spoke on "Some of the Influences Determining Recent Advances in Medical Education." Dr. Welch pointed out that while there were important differences between the two professions, yet in the traditions of learning and character and in the vital interest to the community of safeguarding entrance to the profession, law and medicine were sufficiently similar to justify the expectation that each could find helpful suggestions in the experiences of the other, in respect to education and admission to practice. He pointed out that the apprenticeship system of training was the early method in medicine, but had long since vanished with the rise of medical schools. He stated that in the last fifteen years, the percentage of medical students in schools requiring two years of college work for admission, had increased from 3.9 per cent of the total to 96.1 per cent of the total. On the contrary, of the 147 law schools in 1921, 89 required no college work for admission. The requirement of two years of college work has not eliminated the poor boy from the medical schools, he said. He said over one-half of the Johns Hopkins medical students were working their way through in whole or in part or had borrowed money to get their education.

The morning session on February 24 was presided over by Hon. William G. McAdoo, formerly Secretary of the Treasury. Mr. McAdoo stated that he had been unable to attend a law school, and that he knew by contrast rather than experience the value of a law school education. He maintained that the adoption of the proposed requirements would result in the material and moral betterment of the legal profession and the nation as a whole.[18]

The next topic on the program was "The Technical Education Necessary to Enable a Lawyer to Serve the Public." Mr. James Byrne, of New York, contended that the public character of the legal profession, its participation in the affairs of government, made it all the more necessary that its members should be well educated.

Mr. Charles A. Boston, of New York, praised the information gathered in the Carnegie Foundation's report on "Training for the Public Profession of the Law,"[19] but criticised the conclusions of the compiler of that report. He urged that there is no such thing

[18] Mr. McAdoo's address is printed in full, *infra*, p. 223.

[19] Copies of this report, some 400 pages in length may be obtained from Carnegie Foundation for the Advancement of Teaching.

as intellectual aristocracy, and that it is to the true interest of democracy to cultivate and maintain an educated few that they may be guides and leaders. Although not a college graduate or possessed of a three-year legal education, he favored the proposals.

The next topic, "The Failure of the Law Office to Give an Adequate Technical Education," was introduced by Mr. George E. Price, of West Virginia. Himself the product of law-office training exclusively, he felt that it is now almost impossible for a young man to acquire an adequate legal education simply as a student in a law office, although in his day he thought the law office offered adequate training. Not only has the law become vastly more complex and voluminous, but competent lawyers do not have the time to devote to instructing students, and in many cases specialization makes the successful lawyer unfitted to give instruction in all the branches of the law. He favored the proposals.

Hon. George W. Wickersham, of New York, formerly Attorney-General of the United States, pointed out that the rapid increase in the number of students attending law schools was proof of the failure of law-office instruction, and maintained that the vast multiplication of reports and statutes made the study and application of the law widely different from fifty years ago. He emphasized the inadequacy of bar examinations alone to test the mental equipment or professional and governmental ideals of applicants.

Mr. Thomas Patterson, of Pennsylvania, doubted the value of college training because, he asserted, radicalism and socialism are widespread in many universities.

Mr. Frank H. Sommer, of New Jersey, Dean of the New York University Law School, speaking on "The Place of the Part-time Law School in Legal Education," favored the proposed requirements, and maintained that the part-time school could, by lengthening its course of study beyond three years, offer the poor boy an opportunity to obtain a legal education of high quality.

Dean Charles M. Mason, of the New Jersey Law School, a part-time school, favored the proposed requirements.

Judge Goodwin then presented a series of ten resolutions for adoption.[20] He said: "This is not a resolution that these rules be put instantly in effect, but it is presented as a means of creating conditions that will permit the different states of the Union to put them in effect."

Mr. Julius Henry Cohen, of New York, pointed out that the

[20] These resolutions, adopted without change, are printed, *infra*, p. 229.

object of the resolutions was not to bind the bar associations represented but to aid in formulating public opinion of the bar. He spoke in favor of the resolutions. Hon. Charles S. Thomas, formerly senator from Colorado, opposed the proposals, on the ground that a college education was not a fundamental test of character or ability. He maintained that every citizen of good moral character has the right to practice law, if he "can qualify and has that character before the examining board."[21]

At the final afternoon session, Hon. John W. Davis presided. On motion, speeches on the resolution were limited to five minutes. Mr. John Lowell, of Massachusetts, speaking from fifteen years' experience as a member of the Grievance Committee of Boston, said the certificate of moral character is of little value, and favored the adoption of the resolution.

Mr. W. C. G. Hobbs, of Lexington, Kentucky, heartily endorsed the resolution.

Dean Maurice F. Dee, of the Fordham University Law School, opposed the resolutions, saying that a certain type of college graduate is a greater evil than those who are not graduates.

Mr. Josiah Marvel, of Delaware, moved an amendment that, under proper circumstances, the "equivalent" of three years of law school work be accepted. He pointed out that the resolutions recognized an equivalent for the two years of college work, and urged that a similar provision should be made as to the law school work. His arguments were that the proposed standards are too advanced to be immediately adopted, and that John Marshall,[22] four present members of the United States Supreme Court,[22a] and many other able judges and lawyers, refute the proposition that the making of a good lawyer can only be obtained in a law school. The amendment was seconded.

Mr. W. H. Ellis, of Florida, moved as a substitute that the State Bar Associations represented pledge themselves to take steps to secure legislation vesting in each state bar the power to pre-

---

[21] Excerpts from Senator Thomas' remarks are given, *infra*, p. 226.

[22] See *supra*, Note 17.

[22a] As to the Supreme Court, it seems worth while to note that every member of the present court is a graduate either of a college or of a law school; that five members of the court are law school graduates; and that no member of the present court could comply with the proposed requirements, since none is a graduate of a *three-year* law course. Harvard, in 1877, was the first school to put into effect successfully a three-year law course as prerequisite to a degree. (See Reed, *op. cit.*, p. 177.)—Ed.

scribe suitable qualifications for admission. The motion was seconded.

At this point Mr. Elihu Root made a dramatic appeal to the conference not to stultify itself, not to adopt a resolution wholly ineffective to cure anything, a resolution to approve the standard but remove the standard at the same time.[23] On motion made and seconded, a vote was taken. Mr. Ellis' substitute was lost. Mr. Marvel's amendment was lost. The vote was then taken on the resolutions,[24] which were overwhelmingly adopted.

Mr. Cohen, on behalf of the Committee, then offered a resolution that the delegates and alternates from each state nominate one person to represent the state on "The Advisory Committee on Legal Education of the Conference of Bar Association Delegates," to co-operate with the Section on Legal Education of the American Bar Association, to promote the adoption of the standards approved by the Conference. The resolution was adopted.

After extending a rising vote of sympathy to former President Woodrow Wilson, the Conference adjourned.

E. W. P.

Address of Hon. Elihu Root

At the opening session, Mr. Root[25] said, in part:

Mr. Chairman, and gentlemen of the Conference: Old Dr. Lieber, the great teacher of jurisprudence of the last generation, had posted on the wall of his lecture room the motto, "No right without a duty." It is my pleasant duty to present to you a certain action of the American Bar Association upon which that Association appeals to you for sympathy and assistance. It consists in certain resolutions designed to improve the standard of the incoming Bar, and it is the result of many years of discussion, many committees, many reports, many drafts of resolutions. For 25 years the American Bar Association has acted under a continually growing feeling that the Bar was not functioning quite right, and during all that time local associations and state associations have been appointing committees, receiving reports, and passing resolutions based upon the same feeling.

Some nine years ago the American Bar Association formally

[23] Mr. Root's remarks are given *infra*, p. 228.

[24] See *infra*, p. 229.

[25] Mr. Root is a graduate of Hamilton College, New York, A. B. 1864, A. M. 1867, and of New York University, LL. B. 1867. He has honorary degrees too numerous to mention. His part in American public life is well known to readers of the Bulletin. His latest achievement was taking a prominent part in the conference which succeeded in establishing the new Permanent Court of International Justice.

asked the Carnegie Foundation for the Advancement of Teaching, which had just accomplished a noteworthy study of the teaching of medicine, the results of which had been very salutary to the medical profession, to make a similar study of legal education. That was undertaken by the machinery of the foundation, and last summer the report of the gentleman who had been engaged in the study was produced. In the meantime the American Bar Association reorganized its branch devoted to legal education into a section on legal education and admissions to the Bar, with an executive council. The Section also appointed a special committee composed of half a dozen gentlemen from all parts of the country to take up the question as to what should be done to create conditions which would improve the efficiency and strengthen the character of those coming to the practice of law. That committee met in the City of New York and it sent out questionnaires all over the country to the people who were supposed to be best fitted to make suggestions, to the heads of all the bar associations, state and local, to all the law schools, and to a great number of leaders of the Bar in different parts of the country. They got great numbers of answers, and those they collated and digested.

Then the committee met again and they invited representatives of all sorts of experiences and opinions on the subject to come before them and instruct them. There was a long session in which the heads of the law schools and bar examiners and members of the Bar in active practice came in and talked to the committee and answered questions. As a result the committee reported to the Section of Legal Education and Admissions to the Bar of the Bar Association a series of resolutions which they recommended, designed to take one step at least in the direction of having a more effective Bar, not only now but in the future. Those resolutions which were recommended by the committee went before the Section, at a largely attended meeting in Cincinnati last summer, and were fully debated. Representatives of certain law schools who were opposed came in and argued very fully in opposition. But they were adopted by an overwhelming majority by the Section and recommended to the Association, and in a very fully attended meeting of the Association there was another vote, and they were adopted then by an immense majority. I am now bringing them before you by the direction of the Association with a request for your kind consideration and all the help that you can give us.

(1) The American Bar Association is of the opinion that every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their

entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(2) The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the Bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

(3) The Council on Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not and to make such publications available so far as possible to intending law students.

(4) The President of the Association and the Council on Legal Education and Admissions to the Bar are directed to co-operate with the state and local bar associations to urge upon the duly constituted authorities of the several states the adoption of the above requirements for admission to the Bar.

(5) The Council on Legal Education and Admissions to the Bar is directed to call a Conference on Legal Education in the name of the American Bar Association, to which the state and local bar associations shall be invited to send delegates, for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles above set forth.

You will perceive that the first part of these resolutions—all of the first two—is an expression of opinion by the American Bar Association. Of course that opinion cannot be changed here, in another meeting, differently constituted. What you can do, and what I hope you will do, is to range yourselves by the side of the American Bar Association to give effect to that opinion.

You will perceive that the second part of the resolutions directs action. It directs two kinds of action. First, the action which will be effective in itself; that is, the Council of the Section of Legal Education is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not, and to make such publications available so far as possible to intending law students. Now, that is going on and will continue to go on, and Mr. Sanborn, the Secretary of the Section, who is here, can give you information about the very gratifying results of the publication of these resolutions, in the way of responses from law schools, a large part of which have already announced their intention to make their qualifications conform to the qualifications that should be established in the opinion of the American Bar Association. So no matter what we do here, there will be put before the people of the country and the thousands of young men who are seeking admission to the Bar during this coming year, a list of the law schools which conform to the opinion of the American Bar Association as to what a law school ought to be, and a list of the schools which do not conform to the opinion of the American Bar Association as to what a law school ought to be, with the natural result that all the young men and young women who are able to do so will go to the first-class law schools and none who can get to the first-class will go to the others, and if they are true Americans, imbued with the traditional American impulse always to have the best, you will find the law schools that are what

they ought to be filling up and the law schools that are not what they ought to be dwindling.

The second line of action directed in these resolutions is what has brought us here. It is a direction of the Association to co-operate with the state and local bar associations, to urge upon the duly constituted authorities of the several states the adoption of the above requirements, and the direction for the calling of this Conference, for the purpose of uniting the state and local bodies in an effort to create conditions in the several states favorable to the adoption of these principles.

You see those are two quite separate and distinct lines of action to give effect to these standards: First, the direct communication to the people of the United States upon the authority of the members of the Bar Association of an opinion as to the kind of law school their young men shall go to, and second, an appeal to you members of the state and local bar associations to use your influence and power in the several states to get the state authorities to take over and put into force that same opinion.

Now, this appeal to you and to your associations is not without a basis in past history. The local bar associations have long been appointing committees, passing resolutions in some way to improve the standing and efficiency of the Bar, and particularly of the incoming Bar. And this is an appeal for that union which will make it possible for all the resolutions and all the good intentions of the state and local associations for 20 years past to become efficient and active.

There will be opposition to some of these provisions, and in order to determine how far the opinion of the American Bar Association is praiseworthy and sound and should be supported, it is important to look a little at the trouble which it seeks to cure. That there is trouble I think every one of us feels. It may not be trouble in this particular county, in this particular Bar, in this or that state; but it is trouble in so large a part of the Bar that it affects the whole Bar. You cannot have too many rotten spots in an apple and have the rest of it good. We have for years been hearing just such things as Judge Goodwin tells us out of his experience on the Bench, about the sacrifice of client's interests, increased expense, the continual delays, the sending back of cases for new trial, notwithstanding their merits, owing to the inefficiency and incompetency of members of the Bar. Those reports have been coming from all over and they have blackened the name of the Bar. They have led the public to observing the manifold defects of our administration of justice—its delays, its technicalities, its repeated and oft-repeated appeals and reviews, its long delays which prevent the honest man of modest means from getting his rights, while the rich man, with abundant income, and the sharper, with subtle and adroit ingenuities, can put off indefinitely the granting of justice. That is the charge against us, against you and me; and what is worse still, it is a charge against our free institutions that

is sapping the faith, the confidence, the loyalty of the millions of people in this land, in those institutions.

Apart from those evidences, there is enough in the general conditions to satisfy anyone that either the Bar or somebody else is not quite doing its full duty. Vastly complicated our practice has become. The enormous masses of statutes and decisions have made it so. Twelve thousand to fifteen thousand public decisions of courts of last resort in a year! Twelve thousand to fifteen thousand more statutes from our Congress and legislatures! A wilderness of laws and a wilderness of adjudications that no man can follow, requiring not less, but more ability; not less, but more learning; not less, but more intellectual training in order to advise an honest man as to what his rights are and in order to get his rights for him. Are we doing it? No. The Bar stays still. It has been talking 25 years. The American Bar Association has been talking about it for 25 years, appointing committees, listening to reports and filing them. This is the first attempt, in any authoritative and conclusive way, to do something. I am here to ask you to help in it.

Not only has the practice of law become complicated, but the development of the law has become difficult. New conditions of life surround us; capital and labor, machinery and transportation, social and economic questions of the greatest, most vital interest and importance, the effects of taxation, the social structure, justice to the poor and injustice to the rich—a vast array of difficult and complicated questions that somebody has got to solve, or we here in this country will suffer as the poor creatures in Russia are suffering because of a violation of economic law, whose decrees are inexorable and cruel. Somebody has got to solve these questions. How are they to be solved? I am sure we all hope they will be solved by the application to the new conditions of the old principles of justice out of which grew our institutions. But to do that you must have somebody who understands those principles, their history, their reason, their spirit, their capacity for extension, and their right application. Who is to have that? Who but the Bar? Is the Bar giving it? Is the Bar getting it? The public's judgment is that it is not.

Conditions have so changed from Abraham Lincoln's day that the problem is different and the opportunity is different. Not only that, but the material is becoming different.

I was for many years a member of the Character Committee in the City of New York, appointed by the Appellate Division of the Supreme Court of that Department, and year after year we used to sit, and all the applicants for admissions to the Bar came before us and presented their papers and submitted themselves to such examination as we saw fit to make regarding their characters. And every year, when it was all through, we were compelled to confess to each other that we really did not know anything about the character of nine-tenths of the young men who came

before us. They would get somebody to sign the necessary papers, and they would furnish certain formal statements about their careers. A young fellow just applying for admission to the Bar has not much of a career. It is very difficult to tell much about his character. We could not keep a young man out because we did not know much about him. It would not be fair to deprive him of his chances. Nevertheless, I had, we all had, an uncomfortable and unhappy feeling that we were admitting to the Bar each year some scores and hundreds of young men without any warrant whatever for believing that they had the character that is the most essential thing in the administration of justice.

The old practice of Lincoln's time, under which a young man studied in a law office, got a little coaching, a little steering from the members of the firm, read a few fundamental books and became educated as a lawyer in that way, has passed. Here and there in the country districts it may remain, but by and large it has gone. That path way is no longer open to the young man who is seeking admittance to the Bar. In its place has come the law school; and in place of that assurance which the old lawyer in whose office a boy had studied could give to the court upon his personal knowledge, has come the Bar examination.

Two things, I think, lie at the bottom of our difficulty here. One is that the old system which has passed away was a system that gave moral qualities to the boy. He took in, through the pores of his skin, the way of thinking and of feeling, the standards of morality, of honor, of equity, of justice, that prevailed in that law office; and the moral qualities are the qualities for the want of which our Bar is going down.

Lincoln did not need any such resolutions as we have here. Lincoln inherited and breathed in and grew into the moral quality that makes a lawyer prominent, that makes a judge great.

The other difficulty is that examination is wholly incapable of testing that moral quality of a man. The young men that I have been talking about, whom we have to see with doubt going through the examination and into the Bar were acute, subtle, adroit, skillful. They had crammed for their examinations. They could trot around any simple-minded American boy from the country three times a day. But the thing that we were troubled about in that Character Committee was: Have they got the moral qualities? And we had no evidence that they had. And the evidences are coming in all the time of a great influx into the Bar of men with intellectual acumen and no moral qualities. How are you going to get them? Not by an examination; not by going back to the law office. That is impossible. . . . . These young men to whom I have referred come here, and they are coming to our Bar by the hundreds, with continental ideas born in them. No cramming for an examination will get them out. They are not to be learned or dis-learned out of a book. Those ideas can be modified or adapted to our ideas only by contact with life—contact with American life

—taking in, in the processes of life, some conception of what the American thought and feeling and underlying basis of honesty and justice is.

Now, how can you get it? The idea of this resolution, that the law school should require as one of its conditions for entrance two years in an American college, is an effort, and the only one that has been suggested, to require that these young men shall go and spend an appreciable time under such conditions that they will take in the morale of our country before they are admitted to the Bar. . . . . I said a few moments ago that I do not criticize any continental view of jurisprudence. But I do take leave to say that we want *our* view here in this country to continue.

I do not want anybody to come to the Bar which I honor and revere, chartered by our government to aid in the administration of justice, who has not any conception of the moral qualities that underlie our free American institutions—and they are coming today, by the hundreds.

I know of no way that has been suggested to assure to any considerable degree the achievement of such a view on the part of aspirants to the Bar except this suggestion that they should be required to go to an American college for two years and mingle with the young American boys and girls in those colleges, be a part of their life, and learn something of the community spirit of our land, at its best; learn something of the spirit of young America in its aspiration and its ambition, seeking to fit itself for greater things. That is what they will get in an American college.

Somebody sent me the other day a card that had been circulated from some night school suggesting that this was a snobbish proposal. He who sent it knew little of the American college. We are told that this will keep poor young men out. Keep them out! Do you suppose such a thing would have kept Lincoln out? I have been, within the last year, to three American universities, each one of which had over 11,000 students. I never saw a more inspiring spectacle than I did in going into the great reading room in the University of California and seeing there from a thousand to two thousand young men and women all at work, reading. Oh, my heart grew lighter in its view of the future in the faith of that spectacle!

I know American colleges, and I have seen for 60 years the plain boys trudging over the hills to get an education in order that they might climb the heights of fame and fortune, in order that they might slake the thirst for learning, in order that they might make themselves something bigger and better; and I say to you there is no better democracy in this world than the democracy of the American college. And that is the great thing that is learned there; for in it the youth pass the most formative years of their lives before the spectacle of men who are happy in the pursuit of learning and of literature and of science—happy

in their growth and achievements—without money, without display, without ostentation. There are today over 600,000 young Americans in these institutions. And can you tell me that a boy who is worth his salt, who is fit ever to have a client, who has the character that will enable him to assert and maintain rights, cannot find his way to one of those institutions and spend two years there? If he cannot, he does not belong in the Bar.

One other thing: Whence come these 600,000? Observe, that means every year that more young Americans are going into these institutions than there are in the whole Bar of the United States. They could duplicate the Bar of the United States every year, if all the youngsters that came out went into the Bar. Whence come they? They come from the people of every calling, all over our land, of every condition, from parents who are working hard to educate their children, and from conditions of life where the child has to serve itself. They are coming in response to the universal feeling of the American people that they must make progress. That is where these 600,000 come from. They come from a people who mean to do better, to be better, to be stronger, to do great and greater things.

Is the Bar alone to be free from that noble feeling? The Bar, which deems itself the guardian of the most sacred rights of humanity? Is the Bar to sit silent, passing futile resolutions expressing pious hopes, and unwilling that its ranks shall be elevated by marching side by side with all the rest of the great and aspiring American people?

There is no trouble about a young man getting a college education in this country today—not the least. There is money enough wasted by incompetent, slovenly, ignorant practice, keeping honest men out of their rights, filling up the time of the courts, frustrating efforts at more prompt disposal of cases, and the granting of justice—there is more money wasted each year than would be necessary to pay for the education in college of all the men that will apply for admission to the American Bar for the next 25 years.

One concluding thing: What is all this for? What is the vital consideration underlying all the efforts of the American Bar? We are commissioned by the state to render a service. What we have been talking about is the way of ascertaining or of producing competency to render that service. Upon what standard of judgment shall we consider and attempt to do that? Of our rights? Of the rights of the young men who come here crowding to the gates of our Bar? Is it a privilege to be passed around, a benefit to be conferred? Is there any doubt that that standard is inadmissible? Do we not all reject it?

The standard of public service is the standard of the Bar, if the Bar is to live; the maintenance of justice, the rendering of justice to rich and poor alike; prompt, inexpensive, efficient justice.

Shall we turn our backs on an effort to secure better public

service, and go away and congratulate ourselves on the preservation of the privilege of charging fees for services, without regard to the great duty, the great obligation, the great responsibility, that our privilege carries with it?

The Bar of America has been fumbling for years, through the American Bar Association and state associations and local associations and in private conference and in public address, to find some way to render the public service that we all know we are bound to render, and that we all feel we are not rendering satisfactorily; and this is the one concrete and practical step proposed for the accomplishment of that purpose.

I hope that we shall have the enthusiastic and effective support of all the Bar associations of the country in the maintenance of that standard.

Remarks of Chief Justice Taft

Mr. Taft[26] said, in part:

The law is a learned profession. It requires close, accurate, constant study to master it and to make a man a good and helpful lawyer. Its field is very wide. It must apply to every phase of our many-sided life and society. As life and society grow more complicated, the law takes on that characteristic.

The source of the law is in statutes and in precedents. The statutes are without number and the precedents are myriad and are contained in thousands, yea tens of thousands of volumes. No man can know all the statutes or all the cases which make precedents in the unwritten law, and in the application of statutes. He can only study generally the principles as they are to be found in the leading cases and familiarize himself with the methods available for finding the detailed precedents especially applicable to the case in hand.

This calls for a good and a trained memory, great intellectual industry and facility, a power of analytical and synthetic reasoning, and very wide, general information of society and the practical affairs of men and government, adapting him to quick acquisition of knowledge, accurate and sufficiently detailed to enable him to advise those who seek his assistance, and to maintain or defend their rights in every walk, profession or business in our kaleidoscopic society.

It goes without saying that the best preparation for the successful study and practice of such a profession is a wide and thorough general education. The best general education is to be had at our colleges and universities. There one studies literature, lan-

[26] Mr. Taft's career in public office needs no comment. However, it may not be generally known that he was Professor of Law and Dean of the law school of the University of Cincinnati, 1896-1900, and Kent Professor of Law in Yale University, 1913-21. He was graduated from Yale (B. A., 1878) and the Cincinnati Law School (LL. B. 1880).

guage, mathematics, science, history, economics and government. There one is subject to daily, monthly, semi-yearly or yearly examinations of what he has studied. He is trained to arrange his mental machinery by special review and rapid summary of the study of a considerable period to present it to his examiner in a comprehensive, accurate and logically digested form. He will not remember it all permanently but he will carry enough largely to widen his general information, and what is more important, he will by this constant practice in preparing for such a review and examination acquire a facility in the rapid acquisition and analytical digestion of any of the infinite variety of subjects he may have to be familiar with in advising a client or conducting a litigation for his rights. Such facility will often make the difference between his failure and his success. For no learned profession, therefore, is a thorough and general college education more necessary than for that of the law.

I am not saying that a man may not acquire such an education and preparation without having the benefit and opportunity of a collegiate or university course. There are geniuses in application, men of native intellectuality and ability and high ambition who can mount obstacles and fit themselves for anything to which their will would carry them. But they are rare exceptions. We have to deal, in laying down rules for the required preparation for a profession, with the average man who wishes to practice it, in order that society may be served in a most important capacity by competent practitioners. We should not be governed in laying down such rules by the needs or ambitions of those who would become lawyers. The safety of society, and their useful aid to society are the prime considerations. If a man cannot secure the preparation which an average man should have, to be a lawyer, then he should seek some other avenue of livelihood. We have all the lawyers we need now, and there is likely to be no dearth of them, however thorough the preparation insisted upon. The illustrations of the evil that may be done, by admitting to a learned profession of importance to the community one not properly prepared, are perhaps easier to find and elaborate in the case of physicians and surgeons than in that of the lawyers; but the evil though not as plain is just as great in the injury done to individuals and society.

But I am asked, would you shut out worthy young men so poor that they cannot go to college? Would you bar a man like Lincoln from the Bar because he had to fight his way from squalor and poverty to become the great lawyer he was? No, I would not. Lincoln was a man, and so are all nascent geniuses and leaders like him, who if it had been necessary to go to a college to prepare himself for the Bar would have overcome another obstacle and done so. It was not necessary in his day to have the basis of a college education for admission to the Bar. He educated himself and prepared himself. He would have been better pre-

pared, had he had a college education, but he was a rare mould and his example furnishes no rule which should guide us today. The opportunities for college education are not confined to the great eastern endowed universities, or to the great state universities, now flourishing in every state. The whole country is dotted with collegiate institutions of learning near to the home of every young man anxious to come to the Bar, with facilities for supporting himself through his college course if he has the courage and tenacity and self-restraint to avail himself of them. There are thousands of young men doing this now. Such a man will derive more from his college course than the young man who is supported in college by his parents. He will know what it costs in effort to secure such an education. He will value it his whole life long. He will have in its acquisition a discipline of character that will enable him in the race of life to distance his apparently more fortunate classmates who get remittances from home and regard more highly the diverting pleasures of a college course.

I do not know that I want to be personal, but that comes home to me with such force that I must illustrate it with an anecdote.

My father was the son of a farmer in that part of Vermont where how they live makes a man wonder when he goes to see those hillside farms. And he determined to get a college education, because he was going to be a lawyer. So he got some money by teaching at home. His teaching must have been pretty poor, but he was the head of the class, so he could be sure of questions that he asked. And with the accumulation of a little money he walked down from Vermont to the academy, to get his preparation, and then walked to Yale from Vermont. Then when he went in he worked hard, and he came out successful. And he worked his way through college. Now in his mind the value of education was so firmly embedded that his disgust at the use of the college for pleasure and for athletics was marked in his whole view of the college life, and therefore when I went to college I had a gentleman at home that had an estimate of the benefit he was conferring on me by sending me there. He did not have much of a curriculum, but he got out of college life more than any man that I knew. And why? Because he got with it the discipline of character and the proper estimate of the value of education. Therefore the men who do accept the opportunities that are open to every young man to go through college and work himself through, while it is hard, they are receiving a training that will stand them in good stead in after life and make them as they become, the leaders, wherever they cast their lot.

But I must not dwell on this phase of preparation requirements for the Bar longer. I would not over-emphasize the side and claims of the applicant for the Bar. The great consideration is the usefulness to society of the Bar—as to that, there can be no doubt, that we shall greatly increase the competency of the Bar to discharge its most important function if we insist on the necessary prelim-

inary essential of a thorough college education. In the new rules adopted by the American Bar Association, we have not made a complete college course necessary before study of the law begins, though I hope we may ultimately do so. We are moving in that direction by requiring two years of collegiate training.

Do not for a moment ascribe to me the conviction that a college education will fit all men who have it to become good lawyers. There are many who go through college who are no better prepared to begin the study of the law than men without a college education. They are men upon whom any higher education is wasted. I am sorry to say it, but if it were smallpox they would not run any risk of getting it. But we must be guided in adopting rules for a whole country by the average results of a requirement and not be driven from it by personal exception which would prevent making any rules at all, and open the profession to even greater abuses than now exist, great as they are.

There is nothing aristocratic or exclusive about our policy. When you come to employ a doctor to attend your very sick wife or child, you don't think yourself exclusive, you don't count yourself an aristocrat because you make diligent inquiry to obtain the best doctor you can get. When you are seeking to recover just compensation for a gross injustice done you, or are defending yourself against a dangerous and fraudulent suit against yourself for heavy damages, or are seeking to save your property from total loss at the hands of some one whom you have unwisely trusted with it, you cannot be called a patrician, or a snob, or an aristocrat because you try to find a lawyer who is the ablest and best fitted man to preserve your rights at the Bar. The rules for preparation for the profession of the Bar were adopted for the purpose of making it more likely that you can find such a well-prepared lawyer, and making it less likely that you will hazard your important interests, important at least to you, by placing them in the hands of a man who practices law but who may not know enough to protect them as a competent lawyer would. It will not make certain that every lawyer is competent but it will certainly reduce the number of incompetents. We make haste slowly in this world in reforms. But it is important that we shall be constantly moving in the right direction.

Governor Ralston's Remarks

Ex-governor Ralston,[27] of Indiana, said, in part:

When I was invited to open this discussion, I recalled that the subject we are considering was before the American Bar Association at its last annual meeting, and upon consulting the report of that meeting, I was impressed that the last word had then been

[27] Samuel M. Ralston, b. Dec. 1, 1857; educated at Valparaiso, Ind., Normal School, Central Indiana Normal College, Danville, Ind.; admitted to the bar in Indiana, 1886; Governor of Indiana, 1913-17.

spoken, both for and against the proposition, namely, that before one should be permitted to take up the study of the law, he should have had two years' college experience and training.

All will concede that the more liberally a boy is educated, before he begins the study of the law, the more easily he will master legal questions and become an efficient lawyer.

The question presented by the paper, however, is not whether a well rounded out education is a thing to be desired, before the study of the law is entered upon—that is conceded by all—but it is contended therein that two years' college training shall be a prerequisite to entering upon the study of the law. In other words, the boy who has not had two years' college training shall not be permitted to qualify himself for the legal profession, if the advocates of a two-year college course have their way, even though he has a better basis on which to build a legal training than has the chap with two years' experience in college to his credit.

Perhaps my statement is broader than the language of the paper, but I do not mean it to be. You have in mind the wording of the proposition we are considering, and you remember that in his first paragraph, the speaker informs us that "There are more reasons than one which make it desirable that one who proposes to study law should have at least two years of college experience and training." The implication from this is that if one, proposing to study law, has not had two years' college training, he should neither be permitted to enter a law school nor to take up the law as a profession.

A law school supported by private funds has the right, of course, to fix its own standard of admission for those desiring its advantages with the view of becoming lawyers, but I maintain that no institution, supported by public funds should say to an American boy that he cannot become a lawyer, unless he first wrestles for two years with a college curriculum.

I believe in colleges, and I endorse the wonderful work they are doing, but I am not willing that even a college shall bar a boy from becoming a lawyer who has not been fortunate enough to avail himself of collegiate training for two years.

There is much in this paper that I heartily endorse. I concede that college training will mature the judgment of a student, and sound judgment is essential to the lawyer. I concede that college experience will enable a student of the law to make better use of legal textbooks and law reports, and to become more familiar with economic and social questions, and that these will add to his equipment as a lawyer. Certainly it is true, as the paper suggests, that a college education will be of great advantage to one who desires to be admitted to the Bar, but if he has not been fortunate enough to have been schooled in a college, is it right or wise to deny him admission to a law school or to the Bar, when he shows that he is mentally equipped for such admission? There is no rule of jus-

tice that will withhold from him the right of admission in either case, on the ground that he has not had two years' experience in college.

I would not leave the impression that I am indifferent as to whether a law student has had the helpful assistance of a law school or not. Law schools afford their students very great advantages and qualify them, as a rule, much better than a boy can be qualified for the law in a law office. In truth, I believe so strongly in the work of law schools, that I do not want to see them fix their standards so high that none but boys who enjoy liberal financial means, or who subject themselves to severe hardships, can hope to receive a law diploma.

It smacks of a tragedy to say to a worthy and ambitious youth that he has the ability to do the work of a law school, but that he cannot get a law school education because he has not had two years' training in college, or that he cannot qualify himself for the Bar for the same reason.

While I do not advocate a low standard of mental equipment and training for lawyers, and freely admit the probability of better service being rendered by attorneys of exceptional qualifications, I take the position that an arbitrary requirement of two years' college training is not the proper solution and in many cases would result in unnecessary hardship.

Admission to the Bar is often perfunctory and signifies no particular preparation for the practice of the law. This is not as it should be. A standard for admission to the Bar, showing a liberal preparation to practice law, should be maintained by each of the states, but such a standard should be satisfied when it discloses the requisite ability for the practice of the law, without regard to how that ability was acquired.

The admission requirements should undoubtedly include a good elementary education, the knowledge of how to find the law, and the ability to interpret correctly statements of legal principles and important decisions and statutes, and to know the basic principles of the common law. The ability to analyze, distinguish, and apply principles is also essential, but it does not necessarily follow that these prerequisites can be acquired only by first pursuing two years of collegiate work.

The requirements I suggest will meet the rule of fairness exacted by a sound Americanism, and will develop a class of lawyers sufficiently qualified to safeguard the rights of litigants and wisely to counsel those seeking legal advice with the hope that they may avoid being drawn into the courts. If lawyers can be brought to average up to the standard these requirements would establish, the legal profession would be able to discharge its duty to society and government.

And, after all, it is the man of average ability who is the salt of American citizenship. The average teacher in our schools makes the greatest contribution in character building. The average

farmer, and not exceptionally superior farmers, feed the world, and it is to the average lawyer, in point of character and ability, to whom the people can look with the greatest confidence for the enactment of wholesome laws and the wise interpretation thereof. Any system of study or training that will produce this kind of a lawyer should have the approval of the legal profession.

Mr. Silas Strawn's Address

Mr. Silas Strawn,[28] of the Chicago, Ill., Bar, said, in part:

For more than 30 years I have been actively engaged in the general practice of the law in the City of Chicago. During that entire period it has been a part of my duty, as well as my pleasure and privilege, to direct the work of an average number of 25 lawyers born and educated in different parts of the United States. They have had all of the different degrees of education, both preliminary and legal. There have been graduates from the great universities of this country and of England who have subsequently taken degrees from our principal law schools. There have been graduates of part-time law schools and of evening law schools, with and without the advantage of a preliminary training either in a college or a high school. There have been others who have graduated from part-time or night law schools after having had preliminary college experience. And there have been still others who have acquired their legal training in an office, without ever having attended a law school or a college.

I dislike exceedingly to detail my personal experience, but it has been suggested that the testimony of a witness is entitled to consideration only in so far as he is shown to have had an opportunity to know the facts about which he is called upon to testify. May I ask you, in what I shall have to say, to treat my remarks as purely impersonal, and to regard them only as the experience of an impartial observer of the subject under consideration.

That a college experience and training develops the desire and ability to maintain high ideals of professional conduct seems to me incontrovertible. If this conclusion is not sound, then it necessarily follows that all education and all systematic training and discipline is a failure.

A college education presupposes:

1. Advantageous environment.
2. Opportunity for systematic mental discipline.

Can there be any argument upon the proposition that a student in almost *any* college or university has not a tremendous advantage in the development of habits of application, concentration,

[28] Silas Hardy Strawn, b. Dec. 15, 1866; graduated from Ottawa, Ill., high school, 1885; admitted to the bar at Ottawa, 1889; practiced at Ottawa, 1889-91, and since 1891, in Chicago. Member of firm of Winston, Strawn & Shaw, and General Solicitor for the Chicago and Alton Railroad Company; formerly President of the Chicago Bar Association.

industry, manliness, courage, frankness and, indeed, everything that goes to make for general culture, influence and power over him who is not surrounded by the daily atmosphere of college life? The college age is when the youthful mind is most formative and receptive.

Cardinal Newman well said:

"The practical business of a university is training good members of society. . . . . College honor is the keenest in the community and no higher ideals can be found on earth than in the best thought of our best universities."

Therefore, it seems unnecessary to argue that a college affords an advantageous moral environment. Every one must admit that fact.

That the college or university affords an opportunity for better mental discipline is also an undeniable truth. However naturally able or industrious the student's mind may be, it must inevitably follow that the application of that mind in an orderly, systematic way *all* of the time will produce infinitely better results than will its application at *will* or but *part* of the time.

It has been my invariable experience that, given two minds of approximately equal inherent capacity, the college trained mind when brought to bear upon the solution of any problem requiring concentration and orderly thought will demonstrate greater efficiency than the mind without that training. It is also true that in the practice of the law the college trained mind manifests higher moral conceptions and a keener appreciation of the ideals of the profession.

Although to say it is trite, nevertheless too much emphasis cannot be laid upon the fact that the law is a learned profession.

Never in the history of the world have the requirements for the successful practice of the law been so exacting. With the constantly increasing complexity of our governmental machinery and the creation of bureaus and commissions to perform the various functions of the nation and the several states, the preparation of the lawyer of today to do the work required of him never ends. . . . . No lawyer can expect to attain any considerable degree of success unless he commences his professional studies with the background of a faithfully pursued college course.

We hear the argument that the poor cannot afford to engage an expensive lawyer and that to supply this demand there must come to the Bar practitioners who have so small an amount invested in education that they can afford to sell their services cheaply. I submit this is a mistaken idea of helpfulness. Can any one deny that a cheap lawyer is an expensive luxury? Is it not frequently true that the so-called cheap lawyer charges more for his services than the capable one? There are two reasons for this: (a) His experience and practice are so limited that he has no opportunity to acquire any sense of proportion as to the relative importance of the services performed by him, and (b) he

has not developed the requisite moral conscience or ideal of professional conduct to overcome his inherent predatory desire to follow the advice of Mr. Means in the Hoosier School Master, "Git a plenty while you're gittin', I say to Mirandy."

The deplorable truth is that the poor generally pay more for less efficient legal service, rendered by incompetent lawyers, than the well-to-do pay for similar services rendered by lawyers of recognized ability and standing at the Bar.

The major portion of the vast amount of corrective work performed by the Chicago Bar Association consists in the restoration to unfortunates of money and property of which they have been robbed by unscrupulous lawyers who regard their license to practice their profession as a license to loot.

For two years it was my privilege to serve as a member of the Committee on Character and Fitness of candidates for admission to the Bar of the State of Illinois. During that time there came before our committee more than 400 applicants. Speaking generally, the weakness of the character and fitness of these applicants did not consist in their lack of technical knowledge requisite to pass their examinations. It was because they were lacking in the appreciation of the ethics of the profession and of the moral obligations which rest upon a member of the Bar. Many of them were imbued by a desire to take a short cut to a license because they craved the opportunity to prey upon clients. Others regarded admission to the Bar as a badge of honor without any appreciation of its attendant responsibilities.

It was our unvarying experience that the lack of ability to distinguish between right and wrong and the failure to realize the ideals of the profession were most prevalent among those who did not have a college training.

Therefore, while it may be admitted that there are exceptions to the rule, and that a college education with its advantageous environment and disciplinary opportunities does not always overcome an inherent moral obliquity, I submit there can be no supportable argument against the proposition that a college experience and training necessarily develops "the desire and the ability to understand and maintain high ideals of professional conduct."

Remarks of Dean John B. Keeble

Dean John B. Keeble,[29] of Vanderbilt University Law School, Knoxville, Tennessee, said, in part:

There is not any lawyer active today who claims any sort of position in the community that would not say that the Bar could

[29] John Bell Keeble, b. May 13, 1868; educated at East Nashville Academy and Vanderbilt University (LL. B. 1888). Member of firm of Keeble & Seay, Nashville, Tenn., district attorney for Louisville & Nashville Railroad Company, city attorney of Nashville, 1896-7; Professor of Law in Vanderbilt University since 1900, and Dean of the Law School since 1916.

be elevated and should be elevated. There is not a lawyer, I take it, who would not be inclined to admit, even if he lived in a rural community, that if he had two years of college training he probably would have been a wiser and abler lawyer, notwithstanding the fact that my observation of college life today is that it very frequently mars as well as often makes a man, but that is not the practical proposition. Governor Hadley referred to the statement that Mr. Harriman made to Mr. Roosevelt, "We are practical men." Now, let us look at this question we have to act upon here. You have all settled it so far as the American Bar Association is concerned. Then you ask us who come from Tennesssee and other states in the union to pledge our support to go back and ask the legislature to pass a law which says that no man shall be admitted to the Bar unless he has graduated at a law school that has a three-year course and a requirement for two years in academic work, notwithstanding the fact that such a rule would disqualify every member of the Supreme Court of the United States, every member of the Supreme Court of the State of Tennessee, and practically 90 per cent of the American Bar Association.

Now to go before the Tennessee legislature, which is just as fair in average intelligence and ability as legislatures generally throughout this country, and urge the adoption of a statute like that, would be simply folly. The state of Tennessee is not going to pass any such legislation as that, and I take it that there are many states in the United States that are not going to pass any such legislation as that.

Now I say the trouble with this attitude is instead of stimulating and guiding and persuading men to gradually attain the standards of the Bar they should attain, you place a Bar sinister upon every state that does not follow this signal.

It is a practical question. Even if we thought it were right it could not be done. Not only that, but if we asked the state legislature afterwards, if we said to them, well, if you won't do that, then do this, we would be in the position of having lost influence with them, and it would set the cause of legal education in our section backward instead of forward.

Now it is useless to say that a college should have this requirement for admission. I am prepared to say that those colleges that draw their students from sections of the country that can stand that kind of a requirement ought to have it, but when you come to a section of the country where colleges that have sought to elevate the standard of legal education and have required certain education, have set certain standards, for instance have in some cases required one year's academic work, to endeavor now to carry out this plan of two years' requirements, I say would be useless.

But you say that if the college cannot get that type of man it ought to close its law school. Suppose it did. It would drive

that student body not to Harvard, not to Yale, but it would drive them to the night school and the one year schools and the schools that give inferior instruction, and the young men, instead of getting as good as they can in that situation, would be driven somewhere else. They would not come east or go west or enter the institutions that they could find with those standards. Only a few years ago a one year course was regarded as a very good standard everywhere. We cannot go back to the legislature, then, with this demand, as I say. Let the law schools that can elevate their standard, elevate it just a little bit above their people all the time, just a little bit higher, but never so high that it cannot be reached in the rack by the average man of character and capacity. I will say this, that I could not honestly say that no man should be admitted to practice law in the State of Tennessee, anywhere in the State of Tennessee, unless he had two years of academic work and three years of law work, because I know that in 50 per cent at least of the county seats in my state the practice there does not call for any such learning or attainments, and if a man had that much education, there is not one man out of a hundred that would ever go back and live with father and mother and practice law with the boys among whom he was reared. He would go to the city.

And I want to say this, that I can go out in the mountain sections of the State of Tennessee today and you won't find any law cases there except hog cases and ejectment cases, but I can find a lawyer there who can try an ejectment case according to Tennessee law, who can run off of his feet any of the distinguished lawyers we have heard speak here this morning, not even excepting the distinguished nestor of the American Bar.

To go back to Tennessee, to the legislature there, and say that in order to practice law, in order to try an ejectment case, a man had to have two years' academic work and three years' law work in college, why, they would think I had lost my mind, and they would have a right to think so.

I do not wish to be misunderstood about this question of legal education. I have been an active college professor myself about 20 years in connection with the law school, and I have had to make a living practicing law on the side. At Vanderbilt University we have made a good strong fight to elevate the standards for admission to the Bar and the curriculum and the requirements for graduation, and we are keeping it up, and I believe in it; but I do say this: that I cannot look back upon the history of the Bar of my own state and honestly say that the only road to achievement and position at the Bar must be two years of academic work at some diploma concern and three years in some law school.

I know that Tennessee has given its fair proportion of great lawyers, and it is true today that the average lawyer at the Bar at Nashville, where I live, the average of college men is far greater than it was when I came to the Bar; but I regret to say,

when I consider the fact, that to be a successful lawyer requires not only attainments, but something else, not only character but something else. For the practice of law is an art as well as a science, and no man ever becomes a great lawyer until he has learned it in the school of experience—you cannot learn to try cases anywhere except by trying them. When I look back at members of the Bar of Cincinnati who practiced many, many times before you, Mr. Chairman, when you were on that Bench—such men as Edward Baxter and men of his stamp—we must remember that not one of them had a year's experience in any college or law school; and when I know that there is no man at the Bar today who could hold his own with any one of those men before trial or appellate courts of the state, I cannot say to the young men of Tennessee: This is the only road now for you to get to the Bar, because I know it is not.

We do not suffer much from lack of character among our lawyers, except among our educated lawyers. The Bar has lost the confidence of the people in many ways, but the educated members of the Bar have contributed their part toward losing the confidence of the public. Down in my country the great reason why the Bar does not exercise the same influence in public affairs that it used to do is because too often many of us—and I put myself in that class because I am subject to that criticism—have been retained for many years by large corporate interests, and whether because we feel embarrassed to express ourselves or fear it might react upon our clients, or whether we are embarrassed because we fear our sincerity might be questioned, we have lost our hold on the imagination of the public, not because we do not know law, but because we have withdrawn ourselves from that active touch with the community that those great lights of the law of ancient days had, men who took no regular retainer from anyone, but who were ready as free lances to serve any clients. Down in our part of the country the people have lost confidence in most of the lawyers, and in fact I have heard it whispered that that same situation is more or less true in the City of New York.

Hon. William G. McAdoo's Remarks

Mr. McAdoo[80] said, in part:

A Conference of delegates representing the American, state and local bar associations of the country to consider the very vital question of admissions to the Bar, is a significant and dramatic event in the history of the profession. You have assembled for the specific purpose of discussing the recommendations of the Amer-

[80] William Gibbs McAdoo, b. 1863; educated at University of Tennessee; appointed deputy clerk of the United States Circuit Court for the Eastern District of Tennessee, 1882; admitted to the bar, 1885; practiced at Chattanooga until 1892, when he removed to New York City; now a member of the bar of New York City.

ican Bar Association that, as a condition of admission to the Bar, the applicant shall have had two years of study in a college, and a course of three years' duration in a full-time law school, or its equivalent in a longer course in a part-time law school.

One naturally approaches such a question from a point of view influenced in great measure by the course and experience of his own life. For example, a lawyer who has been constantly and exclusively absorbed in the active pursuit of his private practice will instinctively view the question from the standpoint of the good of the profession alone. But the lawyer whose career has taken him away at times from active practice and immersed him in great enterprises or involved him in large responsibilities of public life, is inclined to view the problem not alone from the standpoint of the profession, but also in its wider aspects—its relation to the public good as well as its effects upon the profession itself.

Then, again, the lawyer who has had the good fortune of a college education and of a thorough course in a law school will naturally regard the more exacting requirements in the way of a collegiate and legal education as essential to the welfare of the profession and to the public good, whereas that great body of lawyers who have had to make their own way in the world, who have never been able to go to college and who have secured a legal education through hard work and struggle in the old-fashioned way—in somebody's law office—with the unsystematic training and the less efficient legal education which necessarily comes from an unthorough school of that character, but who, by their ability and industry, have gained a deservedly high place at the Bar, may naturally hesitate to approve the exacting standard which the American Bar Association seeks to impose.

Unfortunately for myself, I was unable to go to a law school. At the age of 18 I had to leave college and face the world. My only opportunity to gain a legal education was through night studies under the tutelage of the late Honorable William Henry DeWitt, of the Chattanooga Bar. And may I digress for a moment to pay a tribute to this noble man and lawyer, jurist and gentleman, scholar and patriot, whose generous friendship and constant helpfulness toward every young and struggling lawyer endeared him, not alone to them, but to the community in which he lived, and gained for him the unqualified esteem and admiration of his professional brethren. Painstaking, unselfish and thorough as this splendid friend and preceptor was, nevertheless it was impossible for his pupil to receive the systematic, orderly and logical education that a properly conducted law school provides. And so, in my own case, I approach the subject from the standpoint of one who knows by contrast rather than by experience the value of the law school education; but that very fact gives me a keener realization of the importance of the educational standard now proposed.

The responsibilities of the lawyer are so grave and the function he performs is so vital that the value of the highest moral and ethical standards cannot be exaggerated. And those same responsibilities make it imperative that his professional education shall be so thorough that he will be equipped in the highest degree to discharge those responsibilities when he comes to the Bar.

But it is not alone as a member of the Bar that a lawyer is an important citizen and owes great responsibilities to the community. He is a vital and necessary factor in the success of every extensive business enterprise. He exerts a large influence on public opinion and in the main is entrusted with political leadership in the community, the state and the nation.

It is his function not to create strife, but through the processes of the law or through counsel and conciliation, to compose and eliminate it. It is his function not to impede the processes of business, but through clarity of advice and counsel, to facilitate them. Here is this multitude of men, entrusted by the state with the special prerogative of giving counsel and representing in litigation the public at large, and who exercise a great influence over the economic, social and political life of the country.

The American Bar Association's proposal is to create conditions of such a character that in the course of time every member of the profession shall have had at least two years in a university or college, which are, after all, one of the bulwarks of democracy and progress, and shall have devoted himself intensively, at least three years, to the study of his profession. Can there be any reasonable doubt that the success of such proposals will result in the material and moral betterment of the legal profession and of the nation as a whole?

I have in mind, of course, what has been said about the necessity of keeping the profession open to all classes of our citizens and to all ranks of society; but having in view the facilities for education presented by the colleges and the universities of the country and the opportunities offered to industrious and ambitious men to work their way through college, there can be no doubt that the privileges of the Bar would continue to be open to men from every walk of life, regardless of their financial means.

You cannot, of course, under any restricted conditions, have a situation where admission to the Bar is open to every man. The imposition of any requirements at all necessarily means restriction and limitation.

The essential thing is not that every follower of the plow, every worker in the machine shop, every man at the forge, shall have an opportunity to enter the legal profession, but rather that the way shall be open from the plough, from the work shop, and from the forge to the profession of the law, so that men in those callings and similar callings, and their sons, may reach the goal if they have the capacity, the ambition and the willingness to make the sacrifices which proper preparation reasonably requires.

Senator Charles S. Thomas' Remarks

Ex-senator Charles S. Thomas,[81] of Colorado, said, in part:

No man believes more strongly than I in the need of education for the well-equipped lawyer. And so far as these resolutions affect the problem of education and of culture, I am in most hearty accord with them. I do not think, however, that I ever met a real successful lawyer who was not an educated man. Sometimes he got his education as I did and as you, Mr. Chairman, got yours, in that school of hard knocks and in the university of experience. ....Now if a college were to raise the standard then I am for it. I do not mean to say that I am opposed to a college education, but I do say that there is no more ethics, no more morality to be gained from a college education than from an education in a lawyer's office. I have long ago reached the conclusion that education and morality are not comparable terms. We are the best educated people in the world, but are we the most moral? Crime today is so situated, so consolidated, that it receives more immunity than ever before in our history, and yet our education is universal and more widespread than ever before.

One of the greatest lawyers of my acquaintance and I think the greatest lawyer I ever knew, who is in this room—and I am not to be deterred from mentioning his name for that reason—I served in the Senate with him for some years, is Elihu Root, of New York. He would have been just as great a lawyer if he had never seen a college, because he possesses the qualification of genius for the profession, coupled with the capacity for the hardest kind of labor. And that is what John Marshall possessed. Let me say right here, Mr. Chairman, that I disagree with your statement that if Justice Marshall had been face to face with the same requirement which these resolutions would place upon him that he would nevertheless have complied with them. He came out of the Revolution practically a grown man.

Chairman McAdoo:

I mean if faced with them today, under present conditions.

Mr. Thomas:

Well, we will take the conditions as they were, and the same conditions, of course, face a great many people now. Education, that is practical education, I repeat, comes from ability plus industry, and to some extent opportunity, although a man who wants to learn makes the opportunity himself. . . . . I cannot too greatly emphasize the fact that men of standing and character in the profession must be educated men. That is the basis of their capital, and it is that which constitutes the protection of those who need their services. The situation is very well illustrated by an old

[81] Charles Spalding Thomas, b. 1849; LL. B. University of Michigan, 1871; practiced law at Denver, Colo., 1871-9, at Leadville, 1879-85, and at Denver since 1885; Governor of Colorado, 1899-1901, and United States Senator from Colorado, 1913-1921.

Union Pacific contractor out in my section of the world. He made quite a fortune in helping to build that great highway, and then concluded that he would like to go into the banking business, and he became president of a bank. One day a so-called tenderfoot from Massachusetts came in to borrow some money. He showed him a letter from his pastor and then a letter from one of the deacons of his church and then from one of the sisters in his church, and asked how much he could borrow. The old fellow looked at the letters and he said, "Oh, damn your religion, show me your collateral."

It makes no difference what sort of an institution you graduated from or whether you graduated from none; show the capital that you possess as a member of this profession, and you may be very sure that that is all that is or ever has been required.

Mr. Cohen:

Would the Senator advise this Conference to treat the profession from the angle of the opportunity that it furnishes to a young man to make it his livelihood, or would he have this Conference treat it as an opportunity for service to the community?

Mr. Thomas:

Both. By all means, both. I would raise the standard of ethics, I would be in favor of the most drastic regulations seeking to confine admission to the Bar to men and women of high repute and good moral character. There is where laxity exists, and that laxity should be corrected. A man should not be permitted to present certificates from obliging friends to show that his character is good and his morals unquestioned, but he should be subjected to a searching examination, both personally and by reputation. That is the way to raise the standard of the Bar and even then it would be impossible to keep out a great many unworthy members who creep into every profession, however great or however low. . . . .

Mr. Harry S. Knight, of Pennsylvania:

Admitting, Senator, all that you say, that you cannot ascertain a man's character under our present methods, how would you outline a method for raising the standard of ethics?

Mr. Thomas:

I am satisfied that it can be done. If you want an offhand answer, I would say that it could be done very much in the way that we learn of the character of witnesses upon the witness stand. I have no doubt that if a man of questionable reputation should ever fall into the hands of my distingished friend, Mr. Cohen, that his reputation would be revealed in very short order, either to his admiring or disgusted countrymen. The situation as it strikes me is this: Every citizen of the United States of good moral character has the right to join the profession of the law, if he wants to.

Mr. Cohen:

Without training, Senator?

Mr. Thomas:

If he can qualify and has that character before the Examining Board, he should be admitted, yes. If he lacks the training that is necessary, you will never hear from him again, just as a great many college graduates sink out of sight just as soon as they are face to face with the stern realities of a profession. If he has it, the training will come. It has come to you, sir, as it has come to me, and as it has come to a great many men who have adorned the profession, who have been eminent contributors to its glory and who, had they been faced with the qualifications required *in limine* in this resolution, these qualifications that it is proposed to impose upon the young men of the country, would have had to follow some other pursuit.

Hon. Elihu Root's Closing Remarks

Mr. Root's remarks, made just before the vote was taken, are given in full:

Mr. Chairman, I have to leave in 10 minutes to take a train; may I ask the indulgence of this body to use five minutes of that time? There have been two kinds of suggestions made in opposition to the approval of the action taken by the American Bar Association. One is in recognition of the serious evil with which our Bar ought to deal. The evidence that has been produced from many lips here during the past two days shows that this nation, more than one-half of which has come to live in cities where men know little of each other, can no longer maintain a Bar of the quality and character that has built up this republic in accordance with the customs and usages of earlier and simpler times when men lived in rural communities and knew all about each other. But the recognition of that fact distinctly made, for example, by the gentleman from Florida, who proposed the substitute a few minutes ago, is accompanied by a pious hope, a resolution wholly ineffective to cure anything, just such as we have been having for a quarter of a century before the American Bar Association finally came to a concrete conclusion, which, if adopted, will accomplish something. I think that the proposal of my friend from Delaware, Mr. Marvel, is of the same general character. It is to approve the standard but remove the standard at the same time. Now, for heaven's sake, do not let us stultify ourselves. If there is something wrong, as there certainly is, let us deal with it, and not use weasel words about it.

Another class of objection was illustrated this forenoon by my friend, the former senator from Colorado, Mr. Thomas, for whom I have had for 40 years or more, since we first met in the Supreme Court of the United States, not only great admiration, but warm friendship. Now my good friend was responding not to a study of this subject, but responding to the natural reaction of a man who rather dislikes to have the old traditions of his life interfered with by somebody else.

I am willing to admit that if you concentrate your attention, as he did, upon Thomas and me, you do not need any cure. We are too old to be anything else. Whenever trouble comes it comes in the fact that this Bar of ours is being filled up to the brim at every term of court by thousands of young men whom nobody knows anything about. And the question is how to get a line on them so that you can keep the fellows out that are merely trying to get an opportunity to blackmail and grind the face of the poor, merely seeking an opportunity for more successful fraud and chicanery by having a law shingle. How can you let in the good fellows, the earnest, sincere fellows, and keep out the black scoundrels of the future? I have not heard any suggestion that takes the place of saying that you shall have a period, in the nature of a period of probation, where two things shall happen to you; where you shall be under the observation of men whose testimony regarding your daily walk and conversation will be accepted as proving whether you are the right stuff or not, and the other that you shall be under such conditions that you will be taking in through the pores of your skin American life and American thought and feeling.

My friend Thomas did not do himself justice in the story about the banker who said, "Damn your religion, show us your collateral." That is not his character. That did not come from Thomas. That did not come from his heart. It came from the nature of the proposition that he was arguing and I am against it. God forbid that that shall be the principle applied to building up the American Bar of the future. Above all the stocks and bonds that can be made into collateral, stands as a guarantee of the future of our great and prosperous country, the character of the men who come to be called to the Bar. I hope sincerely that this Conference of men who hold dear the good name and the prosperity and the moral qualities of the communities and states from which they come, will not here vote to stop the only effort the Bar has ever made to answer the prayers of the good people who want our country better, and to answer the terrible responsibility that rests upon it to maintain the free institutions which are to perpetuate liberty and order in our dear country.

All that the opposition here comes to is simply to stop, to stop! to do nothing! stop the American Bar Association, disapprove them, tell them they should do nothing! How much better, instead of beating over the prejudices and memories of a past that is gone, it is to take dear old Edward Everett Hale's maxim, "Look forward, not back; look upward, not down, and lend a hand."

Resolutions Adopted by the Conference

Resolved, That the National Conference of Bar Associations adopt the following statement in regard to legal education:

1. The great complexity of modern legal regulations requires for the proper performance of legal services lawyers of broad gen-

eral education and thorough legal training. The legal education which was fairly adequate under simpler economic conditions is inadequate today. It is the duty of the legal profession to strive to create and maintain standards of legal education and rules of admission to the bar which will protect the public both from incompetent legal advisers and from those who would disregard the obligations of professional service. This duty can best be performed by the organized efforts of bar associations.

2. We endorse with the following explanations the standards with respect to admission to the Bar, adopted by the American Bar Association on September 1, 1921:

Every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

3. Further, we believe that law schools should not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff should not depend on the number of students or on the fees received.

4. We agree with the American Bar Association that graduation from a law school should not confer the right of admission to the Bar, and that every candidate should be subjected to examination by public authority other than the authority of the law school of which he is a graduate.

5. Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class.

6. We endorse the American Bar Association's standards for admission to the Bar because we are convinced that no such monopoly will result from adopting them. In almost every part of the country a young man of small means can, by energy and perseverance, obtain the college and law-school education which the standards require. And we understand that in applying the rule requiring two years of study in a college, educational experience other than that acquired in an American college may, in proper

cases, be accepted as satisfying the requirement of the rule, if equivalent to two years of college work.

7. We believe that the adoption of these standards will increase the efficiency and strengthen the character of those coming to the practice of law, and will therefore tend to improve greatly the administration of justice. We therefore urge the bar associations of the several states to draft rules of admission to the Bar carrying the standards into effect and to take such action as they may deem advisable to procure their adoption.

8. Whenever any state does not at present afford such educational opportunities to young men of small means as to warrant the immediate adoption of the standards we urge the bar associations of the state to encourage and help the establishment and maintenance of good law schools and colleges, so that the standards may become practicable as soon as possible.

9. We believe that adequate intellectual requirements for admission to the Bar will not only increase the efficiency of those admitted to practice, but will also strengthen their moral character. But we are convinced that high ideals of professional duty must come chiefly from an understanding of the traditions and standards of the Bar through study of such traditions and standards and by the personal contact of law students with members of the Bar who are marked by real interest in younger men, a love of their profession and a keen appreciation of the importance of its best traditions. We realize the difficulty of creating this kind of personal contact, especially in large cities; nevertheless, we believe that much can be accomplished by the intelligent co-operation between committees of the Bar and law school faculties.

10. We therefore urge courts and bar associations to charge themselves with the duty of devising means for bringing law students in contact with members of the Bar from whom they will learn, by example and precept, that admission to the Bar is not a mere license to carry on a trade, but that it is an entrance into a profession with honorable traditions of service which they are bound to maintain.

LEGAL STATUS OF AMERICAN INDIAN AND HIS PROPERTY

Notwithstanding the fact that from earliest childhood the average American citizen has been keenly interested in the American Indian, yet he knows but little of the modern descendant of this people. He thinks of the present day Indian as a member of a rapidly dying race, speaking a strange Indian tongue of funny grunts, with but little property and of but little national concern. Yet the Indian population in the United States is slowly increasing and today numbers 338,256. That population is scattered throughout every state in the Union in numbers varying from 2 in Delaware to 116,899 in Oklahoma. It includes members of over 60 tribes, speaking different Indian languages, some as unlike one another as the French and English languages. These Indians possess thousands of acres of rich, fertile land, and untold wealth in mineral and oil rights. Their properties are valued at nearly one billion dollars. To administer the affairs of this Indian population the United States maintains in the Interior Department a Bureau of Indian Affairs employing 5,502 people.[1]

Just as but little is known by your average citizen of the numbers, manners and mode of life of the modern Indian, so too among the legal profession but little is generally known of his legal status as well as that of his property.[2] But because the puzzling questions of civil and criminal jurisdiction over the Indian may confront the practicing attorney anywhere, and because the character of Indian titles are often in issue in places far removed from his local habitat, it is the aim of the present discussion to treat of the Indian and his property in a very general way.

The validity of the titles to farm lands predicated on original Indian grants may confront the Iowa attorney at any time as many titles in Wisconsin, Minnesota, North and South Dakota and Nebraska so originate. Or the peculiar status of the remnant of the Sac and Fox tribe of Indians, residing at Tama, Iowa, may sometime come to his professional attention.

Status of the Indian Tribe

In the early history of the nation, Indians were found living in

[1] See Report of Commissioner of Indian Affairs for 1921, pp. 41-69, incl.

[2] Members of the Oklahoma Bar are excepted from this statement as in that state the Indians and their properties command much of the attention of the bar and the courts.

separate and distinct tribes, each with its own laws, customs and usages. The tribal organizations have long continued and are still well recognized. A discussion of the status of the American Indian therefore involves a consideration of his status both in the tribe and as an individual.

One of the first questions presented to the early American colonists was that of the rights of the Indians to the land. It was an accepted principle of European nations prior to and at the time of the discovery of America that the right of discovery carried with it the right of acquisition of the soil and the right of settlement thereon. But this principle was subject to the modification that where there were Indian occupants the discoverer merely had an exclusive right as against other nations to purchase the soil of the Indians as they were willing to sell. The recognition of this right of the natives is well evidenced in the oft told tale of the purchase of Manhattan Island from the Indians. These principles received judicial sanction in the early opinions of the United States Supreme Court with the further express decision that whatever right the Indians had to the lands of the original colonies and later of the United States it was not a right of title or absolute ownership but merely one of occupancy.[3]

By provision of the Federal Constitution, Congress was given power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[4] Like other grants of power conferred on Congress by the Constitution this clause

[3] *Johnson* v. *M'Intosh*, 8 Wheat. 543; *Worcester* v. *Georgia*, 6 Pet. 515. A recent decision of the United States Supreme Court further enunciates this proposition. See *Williams* v. *Chicago*, 242 U. S. 434. Certain Pottawattamie Indians, for and on behalf of the tribe, instituted suit against the City of Chicago and certain corporations occupying lands in Chicago which had been reclaimed from Lake Michigan. It was alleged that the tribe had owned and been in possession of the lands about Lake Michigan up until the time a peace treaty had been entered into between the United States and this and other tribes August 3, 1795. Subsequent to this treaty the tribe ceded its rights to all lands up to the shores of Lake Michigan. But the novel claim was made that such cession did not apply to lands previously submerged but later reclaimed from the lake. Inasmuch as the lands involved were among the most valuable in the city of Chicago the significance of the suit is evident. But the court held that the only immemorial right to the soil possessed by the tribe had been that of occupancy and that when the tribe ceded and abandoned its lands about Lake Michigan that abandonment terminated all rights of occupancy of the tribe or its members.

[4] Section 8 of Article I of the Constitution of the United States.

relating to foreign and interstate commerce and commerce with the Indians has been broadly construed. Commerce with the Indian tribes has been construed to mean practically every sort of intercourse with the Indians either in the tribe or as individuals. The relationship existing between the federal government and the Indians has been likened to that of a guardian and his wards. The guardian has been held to be warranted in taking jurisdiction in any matters which affect the interests of his Indian wards. And under this broad general view jurisdiction has been taken by Congress in many matters which appear to be far removed from matter of commerce with the Indian tribes.[5]

The very provision of the Constitution classified "Indian tribes" on a seeming equivalent with "foreign nations" and the "several states." And in the early treaties between the United States and the tribes, the latter were designated as "nations." This was recognized by Chief Justice Marshall when he declared:

"The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties".[6]

But inasmuch as the Indian tribes dwelt within the boundaries of "the several states," conflict of federal and state jurisdiction over them was inevitable. And in 1831 the state of Georgia, under a state statute, caused the arrest of a white missionary for carrying on his missionary efforts among the Cherokee Indians without having first obtained a state license. He was tried for this offense and sentenced to four years imprisonment at hard labor, but upon writ of error to the United States Supreme Court it was held that this state statute was repugnant to the Constitution and treaties of the United States, and the judgment of conviction was declared a nullity. Though Georgia claimed that its sovereign jurisdiction over the persons and the territory occupied by the Indians justified its action, the Supreme Court, in *Worcester* v. *Georgia*, *supra*, speaking through Justice M'Lean said in part:

"It must be admitted that the Indians sustain a peculiar relation to the United States. They do not constitute, as was decided at the last term, a foreign state, so as to claim the right to sue in the Supreme Court of the United States; and yet, having the right of self-government, they,

[5] For decisions as to the scope of this power see *United States* v. *Kagama*, 118 U. S. 375 and *Perrin* v. *United States*, 232 U. S. 478.

[6] This quotation is from *Worcester* v. *Georgia*, 6 Pet. 515, 559.

in some sense, form a state. In the management of their internal concerns, they are dependent on no power. They punish offenses under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war, and form treaties of peace. The exercise of these and other powers gives them a distinct character as a people, and constitutes them, in some respects, a state, although they may not be admitted to possess the right of soil.''[7]

And this early enunciated principle has long continued. State laws have been held of no force or effect over Indians living in their tribal relations.[8]

In determining the tribal rights and status of the Indians it must be kept in mind that the rule of strict construction does not apply to the treaties between the United States and the Indians nor even to statutes embracing agreements with the Indians. The language used in the treaties cannot be construed to the prejudice of the Indians; it must be construed as 'this unlettered people' understood it. If the words of a treaty be susceptible of a broader meaning than their plain import such an interpretation must govern if so understood by the Indians.[9] Under this rule of broad construction the Indian tribes have maintained a number of successful suits against the United States to recover on Indian claims arising out of certain ambiguities in the treaties.[10] These suits, of course, can only be maintained against the United States by its consent, obtained through Acts of Congress. Most of the early treaties dealt only with the tribes and gave enforcible rights only to the tribes and not to the individual members.[11]

Though tribal organizations, such as existed at the time of the adoption of the Federal Constitution have largely broken up, yet the extension of federal control to meet modern conditions has everywhere been recognized. Federal jurisdiction has been upheld even where it extends to the persons and property of citizen Indians, residing under the jurisdiction of, and wholly within the boundaries of, sovereign states. State courts and state authorities generally have discovered that although the Indians are amenable

[7] Quotation from 6 Pet. 515, 581. The decision referred to wherein it was held that the Indian tribes do not constitute a foreign state with right of suit in the United States Supreme Court was *Cherokee Nation* v. *Georgia*, 5 Pet. 1.

[8] *Kobogum* v. *Jackson Iron Co.*, 76 Mich. 498.

[9] *Worcester* v. *Georgia*, *supra*; *Choctaw Nation* v. *United States*, 119 U. S. 1; *Jones* v. *Meehan*, 175 U. S. 1.

[10] See *Choctaw Nation* v. *United States*, *supra*, and *United States* v. *Omaha Tribe*, 253 U. S. 275.

[11] *Sac and Fox Indians* v. *Sac and Fox Indians*, 220 U. S. 481.

to many state laws and entitled to many privileges under the state laws, the field of state jurisdiction over them has been largely permissive; it may be superseded by Congressional action. Thus it has at all times been difficult and is today even more difficult to determine or even approximate the line of demarcation where federal jurisdiction and authority over the Indian ends and state jurisdiction begins. This is increasingly evident when the status of the individual Indian is considered.

Status of the Individual Indian

While in popular terminology it is easy to determine who is an Indian, that question is not so simply answered from a legal standpoint, especially where the answer may be determinative of the right to share in the distribution of property. It has been held that a white person does not acquire tribal relations and rights as an Indian merely by marriage with an Indian woman and residence on the reservation[12] but among the Five Civilized Tribes in Oklahoma[13] where the tribal organization was well recognized, adoption of a white person or negro into the tribe was sufficient to make such person a citizen of the tribe, and amenable to its peculiar criminal jurisdiction.[14] And the child of a white citizen and an Indian mother, abandoned by its father and reared by its mother, is recognized as a member of the tribe.[15] Most of the Acts of Congress providing for the allotment of land make no distinction between full-blood Indians and those of mixed blood living on Indian reservations in tribal relations, though the right of allotment as Indians has been denied such mixed bloods not living in tribal relations.[16] And the term "mixed-blood Indian," often used in statutes is not meant to refer to those having half white or more than half white blood but includes every Indian having any identifiable admixture of white blood, however small.[17] Enrollment of persons of full or mixed blood as members of various Indian tribes by authorized government officials or commissions has often been absolutely determinative of the status of these indi-

[12] *Stiff* v. *McLaughlin*, 19 Mont. 300, 48 Pac. 232.

[13] The Five Civilized Tribes are the Cherokee, Seminole, Creek, Choctaw and Chickasaw tribes.

[14] *Nofire* v. *United States*, 164 U. S. 657.

[15] *Farrell* v. *United States*, 110 Fed. 942; *United States* v. *Higgins*, 103 Fed. 348.

[16] *Sloan* v. *United States*, 118 Fed. 283.

[17] *United States* v. *Detroit First Nat'l Bank*, 234 U. S. 245.

viduals as Indians within the meaning of Acts of Congress providing for the allotment of lands.[18]

Despite the fact that he is the original occupant of the soil, an Indian is not by virtue of his residence a citizen of the United States. He may acquire citizenship, as does a foreign-born alien, by individual naturalization,[19] or, as has been more generally the case, by collective naturalization of the tribe or a large part thereof. Thus it was declared in the general allotting act or Dawes Act of February 8, 1887, that all Indians born within the United States to whom allotments of land in severalty had been made under that or prior acts, or who had voluntarily taken up their residence separate and apart from any tribe of Indians and adopted the habits of civilized life, were citizens. This was an excellent instance of collective naturalization.[20] And so, too, on the admission of Oklahoma as a state on November 16, 1907, it was provided in the enabling act that all Indians in the new state were citizens thereof and of the United States.[21]

While the fact that citizenship has been conferred upon him entitles an Indian to the benefits of and subjects him to the laws of the state within which he lives the same as other citizens, yet, by the mere grant of citizenship, the United States does not renounce its guardianship over the Indian. This question has often arisen where Congress has passed legislation to protect the Indian in his ownership of property after citizenship had been conferred upon him. An excellent discussion of this is contained in the opinion in *Tiger* v. *Western Investment Company*,[22] wherein certain conveyances by a citizen Creek Indian were set aside as in contravention of an Act of Congress requiring the approval of the Secretary of the Interior as a condition of their validity. The United State Supreme Court, speaking through Mr. Justice Day said:

"Upon the matters involved, our conclusions are that Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people; that there is nothing in citizenship incompatible with this guardianship over the Indian's lands inherited from allottees, as shown in this case;...that it rests with Congress to determine when its guardianship shall cease; and while it still continues, it has the right

[18] *United States* v. *Wildcat*, 244 U. S. 111.
[19] *Scott* v. *Sanford*, 19 How. 393; *Elk* v. *Wilkins*, 112 U. S. 94.
[20] *Kitto* v. *State*, 98 Neb. 164.
[21] *Boyd v. Nebraska*, 143 U. S. 135, 162.
[22] 221 U. S. 286, 316.

to vary its restrictions on alienation of Indian lands in the promotion of what it deems the best interest of the Indians."

So though citizenship may be conferred upon an Indian, both he and his property may continue to remain subject to federal control and supervision.

The matters of criminal jurisdiction over Indians and over crimes committed in "Indian country" have for many years presented most puzzling questions to the courts and attorneys. In the enforcement of liquor laws it has long been recognized that federal jurisdiction continues despite the citizenship of Indian offenders.[23] The introduction of liquor into "Indian country" or upon an Indian allotment is a federal offense punishable in the federal courts. The term "Indian country" has been broadly construed as embracing all lands within an Indian reservation and even towns and villages within such reservations. A station platform on a railway right-of-way through the heart of the Crow Indian Reservation was held to be "Indian country," within the meaning of this act.[24] So, too, when Indian lands have been ceded and the Indian title extinguished, it has been recognized as a right which both Congress and the Indians may impose that the ceded lands continue to be "Indian country" so far as the enforcement of liquor laws is concerned.[25] Under such provision of a treaty or Act of Congress one who sells liquor on lands once occupied by the Indians may find himself liable to this special federal prosecution. But in the absence of express reservation ceded Indian land does not continue to be "Indian country."

"Indian country" has been held to include a pueblo in New Mexico despite the fact that there are some twenty such pueblos

[23] *Hallowell* v. *United States*, 221 U. S. 317. Defendant, an Omaha Indian, was convicted of introducing whiskey into Indian country. He had taken the whiskey from outside the reservation to his home on land allotted to his ancestor and inherited by him. He claimed that he was a citizen of Nebraska and subject only to the police regulations of the state. The Supreme Court held, however, that though for many purposes the jurisdiction of the state had attached and that the defendant Indian as a citizen was entitled to the rights, privileges and immunities of citizenship, yet the United States within its own territory and in the interest of the Indians, had jurisdiction to pass laws protecting Indians from the evil results of introducing intoxicating liquors into Indian country, including Indian allotments.

The sale or gift of intoxicating liquors to Indians was made a misdemeanor in Iowa as early as 1873. See Code of 1907, Section 5001.

[24] *United States* v. *Soldana*, 246 U. S. 530.

[25] *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188.

in that state scattered throughout the state, each pueblo holding an average of 17,000 acres of land in communal fee-simple ownership.[26] And in the exercise of its power to regulate commerce with the Indian tribes Congress can, in effect, in the creation of a new state declare it "Indian country" where such state is created out of territory inhabited by Indian tribes.[27] While many of these questions as to liquor enforcement might seem to be moot questions since the enactment of the Volstead Act, many an enterprising bootlegger has found that in selling liquor to an Indian on an Indian allotment he rendered himself liable to punishment not only for violation of state prohibitory statutes and the federal prohibition act but that the federal authorities may elect to prosecute him for the introduction of liquor into Indian country. And for this the minimum penalty is no petty fine but imprisonment.

But aside from federal jurisdiction to punish for bringing intoxicating liquors into Indian country there are many questions as to the forum in which successful criminal prosecutions may be brought against Indians. Many an Indian has doubtless escaped punishment because of the uncertainty of prosecuting attorneys as to whether duty to prosecute was with state or federal officials.

During the period when tribal organizations were well recognized it was the policy of the United States to leave to the several tribes exclusive jurisdiction to punish an Indian for offenses committed against other members of the same tribe.[28] But by an Act of Congress approved March 3, 1885, jurisdiction was reserved to the Federal courts to punish for murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, committed by one Indian against another Indian or another person, or by a white person against an Indian if the offense were committed within the boundaries of any state and within the limits of an Indian reservation.[29] But where the offense is not within the reservation of this

[26] *United States* v. *Sandoval*, 231 U. S. 28. These pueblo Indians had received grants to the lands of their respective pueblos in common fee simple ownership from the Spanish government. These grants were confirmed by Congress after the acquisition of New Mexico by the United States. It is to be noted in the cited case that the Court said, by way of *dictum*, that it was an open question whether these Indians have ever become citizens of the United States.

[27] *Ex parte Webb*, 225 U. S. 663.

[28] *Smith* v. *United States*, 151 U. S. 50; *United States* v. *Rogers*, 4 How. 567; *Ex parte Crow Dog*, 109 U. S. 556.

[29] *United States* v. *Kagama*, 118 U. S. 375; *Apapas* v. *United States*, 233 U. S. 587.

act and is committed by a citizen Indian amenable to the state laws, the state jurisdiction to punish such offense is exclusive.[30] Thus, the federal courts have exclusive jurisdiction to punish an Indian who assaults another on an Indian reservation where the assault is made with intent to kill, but punishment for simple assault or assault with intent to commit great bodily injury must be had in the state courts. So, too, there is a division of jurisdiction between the offense of rape and assault with intent to rape.[31] It is evident that where there is such division of jurisdiction, there cannot be submitted to the juries in the federal courts the lesser degrees of these crimes. The state jurisdiction is exclusive to punish for any crimes committed by persons not members of the Indian tribe against other non-members even though the offense is committed within an Indian reservation.[32] And in a recent case it was held that the state courts had exclusive jurisdiction to punish for murder committed by one Indian upon another on land allotted to an Indian but on which fee simple patent had issued.[33] Crimes committed by Indians within a state and not upon Indian reservations are of course cognizable in the state courts.

The application of the marriage and divorce laws of the several states to the Indians has proved a difficult problem. As long as tribal relations and government existed, marriages contracted between members of the tribe according to tribal custom were recognized as regular and valid and so were the divorces.[34] But citizenship was conferred on many Indians by declaration of the Dawes Act, *supra*, or other acts, and the Indians were declared amenable to the laws of the states within which they resided. It was immediately and logically contended that thereupon the Indians became subject to the state laws with reference to marriage and divorce and that marriages and divorces, according to the tribal customs, were no longer valid. But the conferring of citizenship did not cause the Indian to shed his tribal customs as a snake sheds his skin. Indian custom marriages and informal divorces continued. It was not so difficult to sustain the validity of the Indian custom marriage by finding in it the elements of a common

[30] *Kitto* v. *State*, 98 Neb. 164, 152 N. W. 380, LRA 1915 F 587 and note on criminal jurisdiction over Indians.

[31] *United States* v. *King*, 81 Fed. 625.

[32] *United States* v. *McBratney*, 104 U. S. 621; *Draper* v. *United States*, 164 U. S. 240.

[33] *Sol Louie* v. *United States*, 274 Fed. 47.

[34] *Cyr* v. *Walker*, 29 Okla. 281, 35 LRA (NS) 795.

law marriage, but the Indian custom divorce, predicated only on a separation when the marriage relation became tiresome, is quite foreign to our system of laws. In *Yakima Joe* v. *To-is-lap*,[35] it was held by the federal court that, notwithstanding the conferring of citizenship upon the Indians, the marriage relations of the Indians were to be determined by their tribal customs, and not by the laws of the state, so long as the tribal relations continued. In some states attempt has been made to remedy the difficulty by recognizing the validity of Indian custom marriages and divorces up to a certain period after the Indians become amenable to the state jurisdiction and thereafter to require compliance with the state marriage and divorce laws.[36] In the light of the somewhat conflicting views it is something of a question as to whether an Indian may be committing bigamy or whether he is simply complying with Indian custom.

The small remnant of the Sac and Fox tribe of Indians residing in Tama county, Iowa, and numbering about 350 has a status peculiar to its members and only to be explained by its history. By treaty of October 11, 1842, the Sac and Fox tribe ceded the lands occupied by them in the then territory of Iowa and were assigned lands in Kansas. In 1855 and later a number of the tribe drifted back to Iowa and settled near Tama on what had been a part of the old reservation. The Iowa legislature in 1856 gave its consent that these Indians and none others remain there and tendered the United States exclusive jurisdiction over these Indians and their tribal lands, and the federal government assumed such jurisdiction.[37] As a result of this special legislation it has been held that the State of Iowa does not have jurisdiction to subject these Indians to its criminal laws except for offenses against whites.[38] Neither does the state have jurisdiction over their domestic affairs and relations. An Iowa district court has been held to have no jurisdiction to appoint a guardian for the person of a minor of the Sac and Fox tribe residing on the reservation.[39]

Property Rights of the Indians

As has been pointed out, the original property right of Indian

[35] 191 Fed. 516.

[36] See Revised Statutes of Nebraska for 1913, Sections 1607-1614 incl.

[37] For excellent discussion of legal history of the Iowa Sac and Fox Indians see *Sac and Fox Indians* v. *Sac and Fox Indians*, 220 U. S. 481.

[38] *Peters* v. *Malin*, 111 Fed. 244.

[39] *In re Lelah-puc-ka-chee*, 98 Fed. 429.

tribes to the soil of the United States was merely that of occupancy. To establish this Indian title, there was required not merely a desultory or constructive possession, but an actual use or occupancy or a joint possession which secured to each tribe either a fixed habitation or the use of the land as a hunting ground to the exclusion of others.[40] But, once such occupancy was established, the United States recognized the necessity of extinguishing the Indian title by securing cessions from the tribes. This was done by means of hundreds of treaties entered into between the United States and the several tribes from the very beginnings of the federal government down to 1871.[41] These treaties not only provided for cessions of lands, by the Indians, but on the other hand, the United States granted to the tribes and to individuals large reservations and allotments of land. In 1871, Congress announced its intention to deal with the Indians thereafter directly through Acts of Congress rather than by treaties, as had been the previous custom.[42]

When Indian reservations were granted either by treaty or statute, the tribes generally held title to these reservations, by the same character of title as in their earlier history; they merely had the right to possess and occupy the land. But this right of occupancy could not be interfered with by others or terminated except by the United States.[43] This right of occupancy of the land was held in common by the tribe; each individual who could establish his membership in the tribe was entitled to share in the use and occupancy of the lands. The fee to the lands so set apart as reservations remained in the United States. Neither the tribe nor the individual members could alienate such lands.[44]

In a few instances, as among the Pueblo Indians,[45] and among the Five Civilized Tribes,[46] fee-simple title to large tracts was granted direct to the tribes, and fee-simple patents to the entire tracts were even issued. So, too, by direct treaty provisions with the tribe, the United States may convey good fee-simple title to

[40] *United States* v. *Choctaw Nation*, 179 U. S. 494.

[41] See compilation of Indian Treaties in KAPPLERS, INDIAN AFFAIRS, LAWS AND TREATIES, Vol. II.

[42] *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294.

[43] *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

[44] *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Delaware Indians* v *Cherokee Nation*, 193 U. S. 127.

[45] *United States* v. *Sandoval*, *supra*, n. 26.

[46] *Tiger* v. *Western Investment Company*, *supra*, n. 22.

individual Indians without any Congressional action or issuance of a fee-simple patent.[47] In general, however, the policy adopted by the United States has been to first set apart reservations for the Indian tribes, then either by treaty or Act of Congress to allot these reservations to the individual Indians, assigning to each Indian certain tracts of land, described according to government survey. This is in pursuance of the policy of the government favoring the separation of the Indian from his tribal relations, and encouraging him in the habits of civilized life.

Two well established methods of alloting Indian lands to individuals have been recognized. The first is by means of the issuance of fee-simple patents conveying title to the premises direct to the allottee, but restricting the right to alienate the lands for a specified period either by the allottee or his heirs.[48] This method, so far as the title conveyed is concerned, needs no explanation; the allottee is vested with absolute ownership restricted only in his right to convey or encumber the land. The second recognized and more generally applied method, has been for the United States to allot the lands to the individual Indians, giving them individual rights of occupancy but retaining the fee title in trust for a specified period, and agreeing to convey the premises by fee-simple patent at the end of that period.

The essential requirement to securing an allotment of land under either of these methods is membership in the Indian tribe. Residence on the reservation has not been a pre-requisite to such allotment.[49] But where the determination of membership in the tribe is left to the Secretary of the Interior, his decision is final and cannot be controlled by *mandamus*,[50] unless his action be arbitrary

[47] *Jones* v. *Meehan*, 175 U. S. 1. Examiners of abstracts of title to such lands would do well to remember that no search of the abstracts will ever reveal a patent from which title can be traced. It is a strange fact that some title examiners believe the fee simple patent to be vested with some greater authority than other direct Congressional or treaty grants of title. Yet the fee simple patent derives its authority from Congressional *fiat* wholly. Attention is also directed to the fact that under certain Acts of Congress, of which the Act of May 27, 1902, 32 Stat. L. 245, 275, is typical, Indian lands have been sold to white purchasers and title conveyed by a deed approved by the Secretary of the Interior, which deed as effectively conveys the title when approved as does a fee simple patent.

[48] See provisions for this type of allotment among the Winnebago Indians in Act of Congress, approved February 21, 1863, 12 Stat. L. 658.

[49] *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401.

[50] *United States* v. *Hitchcock*, 205 U. S. 80.

and in excess of the authority conferred upon him by Congress.[51] The allotment, of course, must be made to a person in being, but after the allotment has been made, it is sufficient to pass full rights of occupancy or title, even though the allottee may have died before the issuance of any patent.[52]

An act typical of the second of the above noted methods of allotment is the general allotting act or Dawes Act of February 8, 1887.[53] Under that act, allotments have been made on many Indian reservations except in Oklahoma. Some of the provisions of that Act are so typical of most allotting acts, and so well illustrate the character of the individual Indian title in allotted lands, that it would be well to examine the exact language of the Act. It provides in part:

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: PROVIDED, that the President of the United States may in any case in his discretion extend the period.

And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void:

PROVIDED, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided . . . ."

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

Examination of the language of the allotting act reveals the fact that, though an instrument described as a "patent" is issued to the allottee, the fee title remains in trust with the United States.

[51] *Garfield* v. *United States*, 211 U. S. 249.
[52] *United States* v. *Wildcat*, 244 U. S. 111.
[53] 24 Stat. L. 388.

Much confusion has arisen from this use of the word "patent." Under certain Acts of Congress authorizing the sale of Indian lands so held in trust with the consent of the Indian allottee, fee-simple patents are authorized to be issued direct to the purchasers.[54] Title examiners are sometimes confused by finding a trust patent issued direct to the Indian allottee, John Doe, followed by a fee-simple patent issued to Richard Roe, the purchaser, without anything to connect up the two grantees in a chain of title. But as a matter of fact the so-called trust patent is nothing more than a paper memorandum, improperly called a patent, showing that at the end of the specified trust period the allottee or his heirs will be entitled to a regular fee-simple patent conveying the fee, discharged of the trust and free from all encumbrance.[55]

Under the terms of this and other allotting acts and the trust patent issued under them, the fee title never vests in the allottee or his heirs in case of his death until the expiration of the trust period. That trust period commences with the actual issuance of the trust patent rather than at the date of the approval of the allotments.[56]

By expressed provision of the allotting acts, restriction is placed on any alienation of the allotted lands by the allottee or his heirs during the trust period; contracts or conveyances touching the lands are declared void. Of course the allottee has no legal title to alienate during the trust period; but he can make no valid contract to later alienate the premises. And if he makes a conveyance before the expiration of the trust period, his subsequent acquisition of title by the issuance of the patent in fee does not vest title in the grantee of the deed by operation of the general principle of estoppel.[57] While it is the general rule that a conveyance with warranty estops the grantor when he afterwards acquires ownership of the land assumed to be granted to deny the grantee's title, this does not apply to the conveyance by the Indian allottee during the trust imposed on his land for such a conveyance is held contrary to public policy, in contravention of statutory prohibition and void. Such conveyance is opposed to the well established policy of the federal government to protect the Indians from their own improvidence.

---

[54] For a typical act see Act of Congress of May 29, 1908, 35 Stat. L. 444.
[55] *United States* v. *Rickert*, 188 U. S. 432.
[56] *United States* v. *Reynolds*, 250 U. S. 104.
[57] *Starr* v. *Long Jim*, 227 U. S. 613.

The right of the United States to sue on behalf of the Indians to set aside conveyances made prior to the expiration of the trust period, regardless of the fact that the allottee has full rights of citizenship, has long been recognized by the courts.[58] So, too, the same protection is placed about Indian ownership of allotments where fee-simple title has been vested in the allottee but his right of alienation restricted. All conveyances of such lands made prior to the expiration of the restrictions on alienation are void and may be set aside.[59] An allottee holding lands under such a title receives full right to alienate the lands, either by the expiration of the period during which the restriction is operative, or by the issuance to him of a certificate of competency by the United States.

The specific provision of the allotting acts, that any contract or conveyance made prior to the expiration of the trust period or the period during which the right of alienation is restricted shall be null and void, is far reaching in its effect. The buyer of real estate in Indian country finds iron-clad contracts and warranties in deeds of little avail. He encounters the old doctrine, often applied to the sale of personalty, of *caveat emptor*. He may even find himself liable to criminal prosecution for inducing the Indian allottee to execute a conveyance in violation of the statutory prohibition. Such an Indian cannot make a valid contract with a real estate agent employing him to find a purchaser where trust or restricted lands are included in the contract, nor can the agent sue on such contract for commissions.[60] And a real estate agent who contracts to convey Indian lands held in trust cannot be held bound by such contract so as to be liable in damages for its breach.[61] But where a conveyance of Indian trust land was made after the fee-simple patent issued and had been recorded in the General Land Office but before the instrument had ever been delivered to the Indian allottee, such conveyance is wholly valid. As with homesteaders patents, full title vests on the recording of the instrument.[62]

By another provision of the Dawes Act and other allotting acts the government agrees to convey the fee of the allotted premises to the allottee or his heirs at the expiration of the trust period "free from any charge or encumbrance." Under that clause al-

---

[58] *Bowling* v. *United States*, 233 U. S. 528.

[59] *Mullen* v. *United States*, 224 U. S. 448; *Deming Investment Co.* v. *United States*, 224 U. S. 471.

[60] *Mann* v. *Brady*, 196 Pac. (Okla.) 346.

[61] *Sage* v. *Hampe*, 235 U. S. 99.

[62] *United States* v. *Caster*, 271 Fed. 615.

lotted lands have been declared non-taxable during the trust period. The leading case to lay down this rule was *United States* v. *Rickert*.[63] When officials of Roberts County, South Dakota, sought to assess and collect taxes against such allotted Indian lands, the permanent improvements thereon and certain personal properties issued the Indian allottee by the United States, the federal government successfully enjoined such action by the state authorities on the ground that it would prevent the United States from conveying the fee to the Indians free of encumbrance. It was pointed out that if the state could legally levy such taxes it could enforce the payment of the taxes by sale of the premises or other property.

The non-taxable character of the property has also been upheld where the allottee held title under a fee patent with restrictions on alienation. This was justified on the ground that the United States had offered and the Indian had accepted the allotment exempt from taxation. This exemption from taxation was determined to be a vested right protected from abrogation by the Fifth Amendment to the Constitution and such that Congress could not remove the restrictions and declare the lands taxable during the original twenty-five year period. Such was the view in *Choate* v. *Trapp*[64] in an action instituted by 8,000 Indians to resist the enforcement of tax levies by the State of Oklahoma. The far reaching effects of these tax cases is apparent. Indian allottees with full rights of citizenship, receiving all the benefits of better schools, roads and other public improvements have been exempted from bearing any share of the tax to pay for such betterments. This has been a serious thing for the states and particularly the counties and small municipal divisions having large Indian populations. The non-taxable feature being a vested right, no legislative relief was available during the trust period. When, however, either by Congressional action or executive authority the original twenty-five year trust periods were extended, relief was secured. By means of Acts of Congress the lands were declared taxable but state authorities were denied the right to enforce collection of unpaid taxes by sale of the lands.[65]

By provision of the Dawes Act and other allotting acts, Indian allotments are declared subject to the laws of descent of the state

[63] Cited *supra*, n. 55.

[64] 224 U. S. 665.

[65] For a typical tax act see Act of May 6, 1910, 36 Stat. L. 348.

or territory where the lands are situate. Jurisdiction to determine the heirs of Indian allottees was originally with the Secretary of the Interior. By Acts of Congress in 1894 and 1901, this jurisdiction was transferred to the federal courts. But finally by the jurisdictional act of June 25, 1910[66] it was made the duty of the Secretary of the Interior, upon notice and hearing, under such rules as he might prescribe, to ascertain the legal heirs of Indian allottees whose lands were held in trust or under restriction. And the determination of heirs by the Secretary was declared "final and conclusive."[67]

The state courts have always been wholly devoid of jurisdiction to settle controversies as to the right of inheritance to Indian trust allotments.[68] And on the enactment of the jurisdictional act noted the jurisdiction of the federal courts terminated even as to pending litigation[69] or even causes pending on appeal from an inferior federal court to a superior one.[70] The action of the Secretary in determining the heirs of Indian allottees is not reviewable by the courts while the Indian and his lands are under federal control nor can his action be controlled by *mandamus* or mandatory injunction.[71] When the fee patent has been issued to the allottee or his heirs, then, in a rare case, the functions of the Secretary having terminated, on a sufficient showing of fraud or error of law relief might be secured in the courts. But no review could ever be had on questions of fact.[72]

Prior to the passage of the jurisdictional act of June 25, 1910, *supra*, an Indian allottee, regardless of his state citizenship, could not make a valid will devising his allotted trust or restricted lands. Under the provision of that act and its amendments an Indian allottee, over twenty-one years of age, was permitted to devise such lands by will. But such will must be executed in conformity to the rules prescribed by the Secretary and is of no force or effect unless approved by the Secretary. And the prohibition of state statutes against one spouse depriving the other of a statutory share of the estate by will has no application to these Indian wills.

[66] 36 Stat. L. 855.
[67] *Hallowell* v. *Commons*, 239 U. S. 506.
[68] *McKay* v. *Kalyton*, 204 U. S. 458.
[69] *Bond* v. *United States*, 181 Fed. 613.
[70] *Parr* v. *Colfax*, 197 Fed. 302.
[71] *Lane* v. *Mickadiet*, 241 U. S. 201.
[72] *Dixon* v. *Cox*, 268 Fed. 285.

If such will meets the approval of the Secretary of the Interior, state prohibitions cannot in any way affect it.[72]

If this discussion of the legal status of the Indian and his property has transcended the bounds of brevity, it has only been due to the writer's desire to merely suggest to the readers in how many ways the Indian and his property are of legal concern and interest to the bar and the general public. The puzzling questions of state and federal jurisdiction, nature of Indian titles, criminal jurisdiction over the Indians have just been touched upon. It has been impossible to point out other equally interesting legal questions relative to the Indians' right to contract, to lease allotted premises, to maintain suits or to call attention to the many peculiar questions of law arising among the Indian tribes in Oklahoma.

KARL J. KNOEPFLER

WALTHILL, NEBRASKA

[72] *Blanset* v. *Cardin*, 65 U. S. (L. ed.) Advance Ops. 625.

Iowa Law Bulletin

Published four times a year by the faculty and students of the College of Law of the State University of Iowa. Issued January, March, May and November.

NOTES

AMERICAN BAR ASSOCIATION MEETING.—The next annual meeting of the American Bar Association will be held in San Francisco on August 9, 10 and 11, 1922. This is the first time that the association has ever met in California. Hon. Charles E. Hughes, Secretary of State, has been invited to deliver the annual address. Lord Shaw, a distinguished British Law Lord, will be the guest of the association, representing the bar of England. The National Conference of Commissioners on Uniform State Laws will meet during the week preceding the session of the bar association. Reduced railroad rates have been secured; for example, to San Francisco from Chicago, the rate will be $86; from Kansas City, $72. Further information may be had from the Committee on Arrangements, Holbrook Building, San Francisco.

IOWA STATE BAR ASSOCIATION MEETING.—The annual meeting of the Iowa State Bar Association will be held at Sioux City on June 22 and 23. The principal addresses will be given by: Mr. Cordenio A. Severance, of St. Paul, President of the American Bar Association; General Nathan William MacChesney, of Chicago, former President of the Illinois Bar Association, who will talk on "Uniform State Laws"; Judge Jesse A. Miller, of Des Moines, who will deliver the President's address; and Mr. William E. Mitchell of Council Bluffs. An afternoon will be given over to discussion of the report of the Committee on Law Reform, of which Judge F. F. Faville of Iowa City is chairman. The banquet will be held Thursday evening, June 22. Judge Miller will be the toastmaster.

BREAKING DESCENT.—Once more the Iowa Supreme Court has had to pass upon a question involving the common law principle of breaking descent. In this case, the testator devised to his wife, in item two of his will, an equal undivided one-third of all the property of which he might die seised, in "lieu of dower and her distributive share"; in item four, the remaining two-thirds of the property to have and hold during widowhood. The wife predeceased the husband. It was held that the wife's share under the will was different from her legal share, and, therefore, she took under the will and by § 3281, Code of 1897[1] her heirs were entitled to the one-third share devised (Weaver, De Graff, and Preston, J. J., dissenting).[2]

The principle of breaking descent has had wide application in England, both as to deeds[3] and as to wills.[4] "By the common law, if any estate had been limited, whether by devise or by assurance *inter vivos*, to the person who, if no such limitation had been made, would have taken the same estate, and in the same manner, as heir by descent, then such person took the estate by descent and not by purchase; and he could not elect which way to take it."[5]

This question was important in the case of collateral heirs, where deceased left no issue capable of inheriting. Altho, as a general rule, land of such deceased person descended, first, to the heirs on his father's side,[6] still, if the land was inherited in fee from the mother, it descended to the heirs on the mother's side, and if deceased had no such heirs, the land did not go to the heirs on the father's side, but escheated. Descent had to be traced from the first purchaser; hence where there was a failure of lineal heirs the land went to the collateral heirs of that ancestor from whom, in reality or fiction of law, it originally descended.[8] But when once the descent was broken, as by a feoffment in fee and a repurchase, such land descended, first, to the heirs on the father's side.[9] The same was true if the descent was broken by deed or will.[10]

The rule was also important in determining whether estates of decedents, in the hands of the heir, would be subject to decedent's

---

[1] "If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will a contrary intent is manifest." Most states have similar statutes. See STIMSON, AMERICAN STATUTE LAW, §2823.

[2] *In re Watenpaugh's Will*, 186 N. W. 198 (Iowa Sup. Ct.).

[3] GRAY, CASES ON PROPERTY, (2nd ed.), Vol. IV, p. 14; *Godbold* v. *Freestone*, 3 Lev. 406; *Godolphin* v. *Abingdon*, 2 Atk. 57.

[4] *Bear's Case*, 1 Leon 112.

[5] SWEET'S CHALLIS, REAL PROPERTY, 3d ed., 239.

[6] *Clerk* v. *Smith*, 1 Salk. 241.

[7] JOSEPH WARREN, CASES ON WILLS AND ADMINISTRATION 4.

[8] 39 L. R. A. (N. S.) 955, note.

[9] Co. Lit. 12 b.

[10] *Supra*, n. 6.

debts.[11] If the heir took by purchase, he took the land free from the debts of his ancestor; if he took by descent, he held the estate as assets, subject to such debts.[12] Hence, in the case of a devise to the heir, if he took a different estate, or in a different manner, from that which he would have received by descent, the creditors could not hold him; but they could hold him if he took the same estate, and in the same manner, as that which the law would have given him.[13]

The principle was involved in cases where the heir attempted to enforce agreements to repair entered into by tenants holding under the ancestor. Thus if land was leased for a term of years and the lessor died before the expiration of the term, his heir, if he took by descent, could enforce the agreement; but if he took by purchase, he could not do so.[14]

The will or assurance *inter vivos*, however, would always break the descent unless it gave the heir an estate the same in quantity and quality as he would have taken had there been no will or assurance.[15] It was broken in the case of a devise in trust for the heir where there was an equitable conversion;[16] but not if the devise was so defective that no conversion resulted.[17] Neither was the descent broken if an estate was devised to the heir charged with the payment of a debt, annuity or legacy.[18]

The rule was changed by statute in England in 1833. "When any land shall have been devised . . . to the heir of testator, such heir shall be considered to have acquired the land as devisee, and not by descent; and when any land shall have been limited by assurance to the person or to the heirs of the person who shall thereby have conveyed the land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance."[19]

Regardless of how the rule originated, whether from custom peculiar to England, or from the supposed application of the principle that a person shall not have by gift that which is his without gift, or from a desire to protect the land by preserving tenure; or whether it was resorted to for the protection of creditors,[20] it has become a part of American law and has been frequently applied in

---

[11] *Supra*, n. 4.

[12] *Godolphin* v. *Abingdon*, *supra*, n. 3.

[13] *Scott* v. *Scott*, Ambl. 383; *Allen* v. *Heber*, 1 W. Bl. 22; *Biederman* v. *Seymour*, 3 Beav. 368.

[14] *Chaplin* v. *Leroux*, 5 M. & S. 14.

[15] 13 Probate Cases Annotated 412, note; also see n. 3 and n. 6, *supra*.

[16] 18 C. J. p. 838, §66; *Ukiah Bank* v. *Rice*, 143 Cal. 265, 76 Pac. 1020.

[17] *Gill* v. *Grand Tower Co.*, 92 Ill. 249.

[18] *Allen* v. *Heber*, *supra*, n. 13.

[19] *Inheritance Act*, 1833 (3 & 4 Wm. IV, c. 106) §3; 73 PICKERING'S STATUTES, 1002.

[20] *Biederman* v. *Seymour*, *supra*, n. 13.

many jurisdictions. But its application here has been under statutes rather than at common law. The common law of descent has been so completely superseded by statute in America that, in the absence of some express statutory provision, the source of the intestate's title is immaterial.[21] But under two classes of statutes,—(1) those which recognize a distinction between land acquired by purchase and that gained by descent, and direct that the latter shall go to the intestate's heirs (no issue surviving) of the whole blood;[22] and (2) those providing that lands inherited by the wife from her husband cannot be alienated by her during a subsequent marriage, and that, in event of her death during coverture, it shall go to the issue of the husband from whom it came,[23]—the rule as to breaking of descent has been applied.[24] Under a special Massachusetts statute, the same principle has been applied in determining whether devised land was to be sold to pay specific legacies;[25] and under a statute of Pennsylvania, to determine whether collateral heirs on both the mother's and the father's side shared in the distribution of decedent's property.[26] The rule has also been resorted to in order to determine whether the distribution of property devised to testator's collateral heirs (there being no lineal heirs) was to be *per capita*, or *per stirpes*;[27] and in questions involving partition,[28] and inheritance tax.[29]

In Iowa, under somewhat different statutes, this ancient common law rule has also been resorted to. Thus in cases involving § 2985, Code of 1897,[30] it has been held that if there is a devise to the issue, of the same estate and in the same manner as they would have taken had there been no will, they take by descent and the statute applies;[31] but if the devise is different, they take by purchase and the statute does not apply.[32] Also under § 3281, Code of 1897, it has been held that where the devise to the other spouse is of the same quality and quantity as his distributive share, the spouse

---

[21] See *supra*, n. 8.

[22] STIMSON, AMERICAN STATUTE LAW, §§3133, 3134, 3139.

[23] Burn's Annotated Indiana Statutes (1914), §3015.

[24] *Nesbitt* v. *Trindle*, 64 Ind. 183; *Dudrow* v. *King*, 117 Md. 182; *supra*, n. 8.

[25] *Ellis* v. *Page*, 7 Cush. (Mass.) 161.

[26] *Burr* v. *Sim*, 1 Whart. 252.

[27] *Post* v. *Jackson*, 70 Conn. 283; *supra*, n. 22, §§3137, 3138.

[28] *Supra*, n. 16.

[29] *In re Hulett's Estate*, 121 Iowa 423.

[30] "If there be no survivor (spouse) the homestead descends to the issue . . . and is to be held by such issue exempt from any antecedent debts of their parents, or their own except of the owner thereof contracted prior to its acquisition."

[31] *Moninger* v. *Ramsey*, 48 Iowa 368; *Kite* v. *Kite*, 79 Iowa 491.

[32] *Reifenstahl* v. *Osborne*, 66 Iowa 567; *First National Bank* v. *Willie*, 115 Iowa 77, 87 N. W. 734; *Rice* v. *Burkhart*, 130 Iowa 520, 107 N. W. 308.

takes under the statute of distribution and § 3281 of the Code does not apply.[33]

As it is settled, then, that where the devise to the other spouse is of the same estate as she would have taken had there been no will, the spouse will take under the statute of distribution and not under the will, the question is whether the facts of the instant case bring it within the rule. In this case, in item two, the wife was devised the identical share (one-third) which she would have taken in the absence of a will; but in item four, she was given an additional interest. It may be conceded for the sake of argument that, had the wife survived the husband, she would have taken under the will. The question then, is whether, in the construction of a will, the situation as it existed at the date of the will, or the situation as it existed at the date of testator's death, should be considered. Under the former view, the estate in the will was greater than that given by statute; under the latter view, the two estates were identical.

As to the latter question, the decisions under the rule against perpetuities[34] seem to be in point. In applying the rule that a future interest must vest within a life in being and twenty-one years, it is not necessary that the interest should have been good if testator had died immediately after he executed the will. It is sufficient, if, taking the facts as they existed at the time of testator's death, the interest would vest within the limits. The same is true in the case of a gift over of personalty. Where there is a devise of personalty to A and his assigns with a gift over on indefinite failure of issue, the gift over is void for remoteness if the first interest vests. But if the first interest fails because of the death of A prior to the death of the testators, the gift over is valid. In both cases the validity of the legacy is determined by the conditions as they exist at the time of testator's death.

These then, are two possible views that can be taken in the construction of wills. The former, the situation at the date of the will, was followed by the Iowa Supreme Court in the instant case; the latter, supported apparently by the dissenting judges in the same case, has been universally applied in decisions under the rule against perpetuities.[34] The former view considers what interest the testator thought he was passing; the latter considers what interest actually passes. It is submitted that a more desirable result would have been attained in the instant case by considering what actually passed under the will than by giving effect to what would have passed had conditions, at the death of testator, been such as he expected when he executed his will.

PROOF OF SPECIFIC INTENT IN BURGLARY.—The crime of burglary at common law was the breaking and entering of a dwelling-house

[33] *Tenant* v. *Smith*, 173 Iowa 264, 155 N. W. 267; *Herring* v. *Herring*, 187 Iowa 593, 174 N. W. 364.

[34] 30 Cyc. 1485.

in the night-time with the intent to commit a felony.[1] This definition is for most purposes the same as that existing under the Iowa code which provides, "That if any person break and enter any dwelling-house in the night-time with the intent to commit any public offense . . . ., he shall be guilty of burglary."[2] Under the statute as well as at common law the crime was not committed unless the person breaking and entering had a certain specific intent at the time the acts of breaking and entering were committed.[3] At common law this specific intent had to be an intent to commit a felony and under the rules of criminal procedure the particular felony which it was alleged the defendant intended to commit had to be set out in the indictment. This requirement has been modified by the Iowa statute to the extent that the showing of an intent to commit any "public offense" is sufficient. In some of the cases hereafter mentioned[3a] arising under the statute the court stated that the prosecution must establish a "felonious intent" on the part of the defendant at the time of the breaking and entering. It is submitted that the court committed at any rate a technical error in the use of the word, "felonious," in this connection. A showing of an intent to commit any public offense, either misdemeanor or felony, should be held sufficient under the Iowa statute.[3b]

The recent Iowa case of *State* v. *Farrand*[4] involved the determination of the effect of certain evidence in establishing this specific intent. The indictment in that case was for the breaking and entering with the intent to commit an assault. Practically the only evidence in the case was that the defendant broke and entered the house through a window by taking off a screen and that when inside, being intoxicated, he had staggered against the person of the occupant of the house. The conclusion of the court was that there was not sufficient evidence to warrant the jury in finding that the breaking and entering was with the intent to commit a public offense.

The Iowa court has held that the intent may be proved by circumstantial evidence and that the fact of breaking and entering was a fact or circumstance from which an inference of an intent might be made out.[5] In taking this position the Iowa court adopted the rule followed by a majority of the courts both under common and statutory law.[6] The policy behind such a rule is strong since

---

[1] WHARTON, CRIMINAL LAW (10th ed.) sec. 758.

[2] Code, 1897, sec. 4787.

[3] *State* v. *Worthen*, 111 Ia. 267, 82 N. W. 910.

[3a] *State* v. *Farrand*, 135 N. W. 586; *State* v. *Maxwell*, 42 Ia. 208.

[3b] Code, 1897, sec. 4787.

[4] *State* v. *Farrand*, 135 N. W. 586. For a statement of the facts of this case, see RECENT CASES, *infra*, p. 263.

[5] *State* v. *Teeters*, 69 Ia. 717, 27 N. W. 485.

[6] WHARTON, CRIMINAL LAW (8th ed.) sec. 811.

it would be practically impossible for the prosecution to obtain direct evidence of the intent of the accused.

Granted that the intent can be shown by circumstantial evidence, the next problem is to determine from what facts an inference of intent can be legitimately drawn. If there is an actual breaking and entering followed by the commission or the attempted commission of a felony, practically all the courts would say that the facts thus shown warranted an inference of an intent to commit such felony at the time of the breaking and entering. The majority say that the proof of the actual commission of a felony is the best evidence of the felonious intent.[7] Beyond this point there is not so much unanimity of opinion as to what inferences of intent can be drawn from certain sets of facts. The Iowa court has taken rather an extreme position. In *State* v. *Teeters*,[8] where the intent alleged was an intent to commit larceny, the court held that the intent to steal might be inferred from the mere fact of breaking and entering in the absences of circumstances showing a different intent. *State* v. *Maxwell*[9] is a similar case and the decision there was the same with the added opinion that the breaking and entering was not only evidence but strong presumptive evidence of an intent to steal. The most extreme position taken by the Iowa court is found in *State* v. *Fox*.[10] There the court held that where there was no other evidence but the breaking and entering the inference could be made that there was an intent to commit a public offense. If this view were taken to its logical conclusion, the result would be to do away with the necessity for proving a specific intent. It is to be noted, however, that the indictment in the Fox case was for breaking and entering with the intent to commit larceny. Though the language of the opinion is broad, the decision upon the facts goes no farther than the Teeters case. In *State* v. *Worthen*[11] the indictment alleged a breaking and entering with the intent to commit larceny and there was some evidence to show that the actual intent was to commit another offense. Even in that case, however, the court held that the inference of an intent to steal might be drawn from the mere fact of breaking and entering. A few other courts have adopted somewhat similar rules but none of them go quite so far as the decisions in the Fox and Worthen cases. Some doubt has lately been cast upon the position of the Iowa court by the decision in *State* v. *Cook*.[12] In a *dictum* in that case appears the following language, "It is true that the intent may be and usually must be established by circumstances rather than from direct evidence but it cannot be inferred from the

[7] 9 C. J. 1079; *Com* v. *Tuck*, 20 Pick. 356; *State* v. *Henley*, 30 Mo. 509; *State* v. *Ward*, 116 Minn. 516, 134 N. W. 115.

[8] 69 Ia. 717, 27 N. W. 485.

[9] *State* v. *Maxwell*, 42 Ia. 208.

[10] *State* v. *Fox*, 80 Ia. 312, 45 N. W. 874.

[11] 111 Ia. 267, 82 N. W. 910.

[12] *State* v. *Cook*, 188 Ia. 655, 176 N. W. 674.

mere attempt to break and enter." It would seem that the inference of an intent to steal from the fact of breaking and entering is entirely reasonable. The breaking and entering is nearly always followed by acts of thievery or attempted thievery. It is submitted that the *dictum* in the Cook case should be disregarded. The present state of the law would be, then, that an inference of an intent to commit larceny can be drawn from the mere fact of breaking and entering, and that this inference is, in the absence of contrary evidence, sufficient to sustain a conviction, under an indictment for breaking and entering with intent to commit *larceny*.

In the recent case, however, the alleged offense was a breaking and entering with the intent to commit an *assault*. The only pertinent facts brought out by the testimony were the breaking and entering and the technical assault committed by the defendant when he staggered against the person of the occupant of the house. There was enough evidence explanatory of this latter fact, however, to take away any inference of an intent to commit the same at the time of breaking and entering. The decision turned altogether upon whether there would be any inference of an intent to commit an assault from the breaking and entering. The opinion of the court to the effect that there was no such inference to be drawn seems sound. The Iowa cases previously referred to in which an inference of in' t was made were all cases in which the intent alleged was an in nt to commit larceny. As pointed out before the inference in such situation is entirely reasonable. To go beyond this, however, and say that, if the indictment is for a breaking and entering with an intent to commit an assault, such intent may be referred from the bare breaking and entering, is to abolish the necessity for proving a specific intent. Furthermore, if the inference to be drawn from mere breaking and entering is an intent to commit larceny, as the Iowa court has already decided, logically there can from these same facts alone be no inference of an intent to commit a different offense, namely, an assault.

RECENT CASES

CONSTITUTIONAL LAW—FOREIGN CORPORATION—STATE EXPULSION FOR REMOVAL TO FEDERAL COURT WHERE ENGAGED ONLY IN INTRA-STATE BUSINESS.—On February 27, 1922, the Supreme Court of the United States, Taft, C. J. delivering the opinion, without any dissent held, that a state may not constitutionally expel, or revoke the license of, a foreign corporation (which the court conceded was doing only a domestic business within the state) on the ground that the corporation has removed to a federal court a suit brought against it in a State court. *Terral* v. *Burke Construction Co.*, 42 Sup. Ct. 188. The opinion states that the cases of *Doyle* v. *Continental Ins. Co.*, (1877), 94 U. S. 535, 24 L. ed. 148, and *Security Mut. Life Ins. Co.* v. *Prewitt*, (1906) 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, are overruled, "and that the views of the minority judges in those cases have become the law of this court."

That a corporation is not a citizen within the purview of Section 2 of Article IV of the Constitution of the United States and that a state may refuse to permit a foreign corporation to carry on business within the state, except to engage in interstate commerce or to act as an agent of the federal government, was long ago established. *Bank of Augusta* v. *Earle*, (1839) 13 Pet. 519, 10 L. ed. 274; *Paul* v. *Virginia*, (1869) 8 Wall. 168, 19 L. ed. 357. A number of cases have held that contracting insurance between an insured in one state and an insurer in another state is not a transaction of interstate commerce; indeed some of the opinions state that insurance is not commerce. *Paul* v. *Virginia, supra; N. Y. Life Ins. Co.* v. *Cravens*, (1900) 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. 962. The instant case reflects no doubt upon these propositions.

The opinion of Chief Justice Taft is confined with what appears to be caution to citation of cases which have dealt with a state's making removal to a federal court a ground for expulsion. There is no indication on the face of the opinion that any other holdings are disturbed or isolated for observation. It is to be noted that Justice Day's dissenting opinion in the Prewitt case which the Chief Justice refers to as having become the law of the court contains this sentence: "As a general proposition it is undoubtedly true that a state may prevent foreign corporations, at least those not engaged in interstate commerce, from doing business within its borders and may impose restrictions upon the right to transact local business as it may see fit." This general proposition was announced as early as 1839, in *Bank of Augusta* v. *Earle, supra*, never since judicially doubted, and maintained in numerous decisions. There is nothing on the face of the opinion in the present case that reflects doubt upon this general proposition. The majorities in the Doyle and Prewitt cases merely followed this general formula logically to the effect that this power was really unre-

stricted and allowed expulsion for the removal of causes to federal courts. Justice Day, on the other hand, went on, from the words above quoted, to say: "But this right in our opinion [his and Justice Harlan's] is not without limitation," that it did not extend to the exercise of the right of removal which is given by the Constitution and Statutes of the United States; and he argued that the doctrine of the majority would logically extend to permitting a state to force such foreign corporations to surrender other constitutional rights. Here is broader ground, viz. that the restrictions a state may see fit to impose do not extend to requiring a foreign corporation doing solely intrastate business to forego federal constitutional rights. The reasoning of the Doyle and Prewitt cases was logical, for if the state's power to expel was arbitrary then as against the state such foreign corporation had no constitutional privileges or immunities. It seems, therefore, that expediency or experience is once again to have the shaping of the law. So while on the face of the opinion a single rule is altered, there lies implicit in the reasoning of the dissenters in the Doyle and Prewitt cases so broad a field that a full discussion cannot be made within the limits of a brief note. The little monograph by Gerard Carl Henderson, The Position of Foreign Corporations in American Constitutional Law (1918), forecast the present decision and makes much headway in the discussion of the problems ahead.

The break toward the broader exception above indicated, viz. that a foreign corporation cannot be expelled for failure to forego the exercise of *any* federal constitutional right, came in 1910. In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. 190, it was held that a state could not revoke the license of a telegraph company, doing both inter-state and intra-state business, to continue its state business therein because of its refusal to pay a tax of such a nature that the payment of it would have been a surrender of the immunity secured it by the due process clause not to pay taxes on property outside the state and a surrender of the immunity implied from the commerce clause not to have its inter-state business indirectly subjected to an undue burden. In the opinion of Harlan, J., for the majority, the Doyle and Prewitt cases were not overruled, however, but distinguished as "cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in inter-state or foreign commerce." See also *Pullman Co.* v. *Kansas*, (1910) 216 U. S. 56, 54 L. ed. 378, 30 Sup. Ct. 232; *Ludwig* v. *Western Union Tel. Co.*, (1910) 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. 280. Compare, *Southern Railway Co.* v. *Greene*, (1910) 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. 287, that in some circumstances a foreign corporation is entitled to equal protection of law.

In *Herndon* v. *Chicago, R. I. and P. R. Co.*, (1910) 218 U. S. 135, 54 L. ed. 970, 30 Sup. Ct. 633, it was held that the license of a railway company to do local state business, where it was also doing inter-state business, could not be revoked because of its

removal of a case to a federal court. The nature of the business carried on by a corporation is not an adequate ground for distinguishing the Doyle and Prewitt cases, they were not referred to in the opinion of the court delivered by Justice Day and it might fairly have been inferred that they were impliedly overruled; but in 1914, in *Harrison* v. *St. Louis & San Francisco R. R. Co.*, 232 U. S. 318, 58 L. ed. 621, likewise involving the revocation of a foreign railway corporation's license to do local business, Chief Justice White referred to the Doyle and Prewitt cases in language that could not be used with intellectual honesty if those cases were then regarded as overruled. Again in a like holding in 1916 involving the validity of a revocation for removal statute as affecting a foreign coal company and a foreign telegraph company they were spoken of as "commercial corporations" doing local business and inter-state business. *Donald* v. *Philadelphia & Reading Coal Co.*, (1916) 241 U. S. 329, 60 L. ed. 1027, 36 Sup. Ct. 563.

At last the court has been explicit. The Doyle and Prewitt cases are expressly overruled. The foreign corporation before the court was a construction company engaged merely in local business within the state. Chief Justice Taft says, "The principle does not depend for its application on the character of the business the corporation does, whether state or inter-state, although that has been *suggested* as a distinction in some cases."

D. O. MCGOVNEY.

CONSTITUTIONAL LAW—MUNICIPAL ZONING—POLICE POWERS—POWER OF A CITY TO EXCLUDE GASOLINE FILLING STATION FROM RESIDENCE DISTRICT.—Chapter 138, Acts 37th G. A., provides that cities under commission form of government or special charter may, on petition of sixty per cent of the owners of real estate in a given district, designate the district a restricted residence district, and provide that no buildings except residences, churches and schoolhouses may be erected therein without first securing a permit from the city council, and that all buildings erected in violation of such ordinance shall be deemed nuisances. Defendant obtained a building permit to erect a gasoline filling station at a certain intersection in Des Moines, but it was later revoked. Thereafter the city council passed an ordinance declaring the district within which the filling station was to be erected a restricted residence district. The ordinance provided that no building other than a residence, schoolhouse or church could be erected within the district without first securing a permit from the city council, and that no such permit would be granted when sixty per cent of the owners of realty within the district objected thereto. Any building erected within the district in violation of the ordinance was declared a nuisance. Defendant threatened to erect the proposed filling station without securing a permit in compliance with the ordinance. The city sought an injunction restraining the defendant from such action, contending that the filling station would be detrimental to the health, comfort and general welfare of the residents of the district

and would constitute a nuisance. Defendant contended that the filling station would not constitute a nuisance and that the refusal to grant the permit was unconstitutional. Held, that the refusal was a valid exercise of police power and that the injunction should be granted. *City of Des Moines* v. *Manhattan Oil Co.*, 184 N. W. 823. (Iowa Sup. Ct.)

The police powers of a state are very extensive and are not as yet clearly ascertained. As pointed out by Justice Weaver in the principal case, at page 826, no comprehensive definition of such powers has yet been given by any court, nor is it possible or desirable that one should be given. They are generally exercised to promote public health, safety and morals, but they also extend to the promotion of "public convenience and general welfare." *C., B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, at 592. The legislature permits certain police powers to be exercised by municipal governments. Accordingly, cities have been permitted to prohibit the use of buildings within the city limits for certain purposes on the grounds of promoting public health, safety and general welfare. *City of Newton* v. *Joyce*, 166 Mass. 83, (license required to erect a stable in city); *Storer* v. *Downey*, 215 Mass. 273, (consent of aldermen required before a public garage could be built in city); *State* v. *Taubert*, 126 Minn. 371, (consent of city council necessary to build tannery within city); *State* v. *Withnell*, 91 Neb. 101, (brick kilns excluded from city). This power has been extended so that a city may establish a residence district and prohibit the use of property within the district for certain purposes. *Little Rock* v. *Reinman-Wolfort Co.*, 107 Ark. 174, 237 U. S. 171, (livery stable); *In re Montgomery*, 163 Cal. 457, (lumber yard); *Ex parte Quong Wo*, 161 Cal. 220, (laundry); *State ex rel. Grain Co.* v. *Houghton*, 142 Minn. 28, (cereal mill); *Salt Lake City* v. *Western Foundry Wks.*, 187 Pac. (Utah) 829, (foundry). Cities have likewise been permitted, in the regulation of the use of property in residence districts, to provide that certain uses of such property may be made only after permission is secured from the majority of property owners in the neighborhood. *Myers* v. *Fortunato*, 110 Atl. (Del.) 847, (garage); *U. S. ex rel. Early* v. *Richards*, 35 App. D. C. 540, (garage); *Weeks* v. *Heurich*, 40 App. D. C. 46, (garage); *City of Chicago* v. *Stratton*, 162 Ill. 494, (stable); *Patterson* v. *Johnson*, 214 Ill. 481, (blacksmith shop); *People ex rel. Busching* v. *Ericsson*, 263 Ill. 368, Ann. Cas. 1915C 183 and note, (garage). In the cases last cited it was held that the requirement that a majority of the property holders in the neighborhood should give their consent to the use of the property was not a delegation of legislative authority, and that the regulation was not unreasonable.

But certain restraints have been placed upon the exercise of police powers in regard to the use of property in a city. One of these is that the regulations cannot be based solely on aesthetic grounds. Thus, statutes and ordinances that prohibit bill-boards

in residence districts, or seek to regulate their use in a city, have been held to be unconstitutional when based on aesthetic grounds alone. *Commonwealth* v. *Boston Adv. Co.*, 188 Mass. 348; *People ex rel. Adv. Co.* v. *Murphy*, 195 N. Y. 126, 21 L. R. A. (N. S.) 735 and note; *Haller Sign Wks.* v. *Physical Culture School*, 249 Ill. 436, 34 L. R. A. (N. S.) 998 and note. Municipal regulation of bill-boards in residence districts is upheld when shown to be based on the promotion of public health, safety or morals. *Cusack* v. *City of Chicago*, 267 Ill. 344, 242 U. S. 526. Similarly, a statute cannot control the height of buildings in certain sections of a city merely for aesthetic reasons, but must be based on other grounds. *Atty. Gen.* v. *Williams*, 174 Mass. 476, at 480; *Welch* v. *Swasey*, 193 Mass. 364, 214 U. S. 91. Upon similar reasoning it has been held that stores cannot be excluded from residence districts by a mere police regulation because such a regulation deprives a person of valuable property rights without promoting public health, morals or general welfare. *Williston* v. *Cooke*, 54 Colo. 320; *People ex rel. Friend* v. *City of Chicago*, 261 Ill. 16; *Stubbs* v. *Scott*, 127 Md. 86; *State ex rel. Lachtman* v. *Houghton*, 134 Minn. 226.

The statute and ordinance involved in the principal case, both, contained a restriction as to stores in the residence district. Such a restriction would be void under the present trend of authority. But the reasons given by the court for its decision were in many respects not applicable to the case of a store. They were similar to the reasons given in the cases that sustain restrictions as to public garages. If the case is to be limited by the language of the opinion, holding the ordinance valid only as applicable to the case of a gasoline filling station, it is clearly in accord with the weight of authority.

CONTRACTS—OFFER AND ACCEPTANCE—REAL ESTATE BROKERAGE.—Defendant on April 21, 1920 wrote to plaintiff, a real estate broker in the same city, a letter of the tenor following: "I offer you subject to acceptance within ten days property on Mulberry street for the sum of $67,500.00 and will give contract for deed payable $5,000.00 down and $2,000.00 per year with interest at 6% per annum payable semi annually." Plaintiff testified that at that time defendant had agreed to pay plaintiff $1,500.00 commission and that the price stated included that commission. Defendant was ordered to produce this agreement, but failing to do so, plaintiff was allowed to state its contents. On April 24, 1920, one E. L. Lloyd, by writing, endorsed on the letter, accepted the above offer. Lloyd was a purchaser who was found by the plaintiff Barnett. On April 26, 1920 Lovejoy by writing withdrew the offer. Plaintiff brought suit to recover the commission agreed upon. Held, that the contract was not a listing contract but a mere offer to sell and since it was revoked by the offerer before acceptance by the offeree, there was no contract. Judgment for the defendant. *Barnett* v. *Lovejoy*, 186 N. W. 1 (Iowa Sup. Ct.) (Preston, Faville and De Graff, JJ., dissented).

The main point of the decision as made by the court is that, assuming the letter written by the defendant of April 21st to be a mere offer and not a listing contract, the acceptance of Lloyd, a third party, is not such acceptance as to make a binding contract either as between plaintiff and defendant or as between Lloyd and defendant. If it should be conceded that the assumption of the court is correct, the decision is entirely in accord with settled principles. Contracts may be assigned. *Rappleye* v. *Racine Speeder Co.*, 79 Iowa 220, 44 N. W. 363. However under the general rule only the rights under a contract may be assigned and not the liabilities. *Friedlander* v. *N. Y. Plate Glass Co.*, 56 N. Y. S. 583; and the test of the assignability, even of the rights, is the intention appearing from the contract. *Devlin* v. *New York*, 63 N. Y. 8. From these settled principles it follows that an offer to one party can not be accepted by another so as to make a binding contract. The very nature and intention of an offer will forbid such a result in that the acceptance by the third party cannot impose any liabilities upon the offeree and would leave the offerer open to impositions by persons with whom he had no intention of dealing.

The remaining point is, then, did the court hold correctly in construing the letter of the defendant as a mere offer to sell to the plaintiff? The defendant knew the plaintiff to be a real estate broker selling real estate on commission, had made a previous agreement with him as to commission, and had gone so far as to include the commission agreed upon in his offer price. Yet the majority of the court thought the case did not come under the rule that contemporaneous written agreements must be construed together when dealing with the same subject matter (*Elmore* v. *Higgins*, 20 Iowa 250) for the reason that the rule only applies when there is an ambiguity upon the face of the contract. However, it seems that when the other facts of the case are looked into the intention of the letter is sufficiently ambiguous to permit the court to construe the two instruments together. The case comes midway between the decisions of *Bert* v. *Stringfellow*, 45 Utah 207, 143 Pac. 234, holding that an offer to sell to a real estate broker wherein a commission was provided in case the broker should find a purchaser, created an agency; and *Clammer* v. *Eddy*, 41 Colo. 235, 92 Pac. 722, holding that where a broker obtains from the owner a statement as to the price of real estate and the owner has no reason to suspect that the broker expects a commission, there is no brokerage listing contract but a mere offer to sell. The case is a close one on the facts and could probably have been decided either way. The court's decision is probably the most conservative.

CRIMINAL LAW—SPECIFIC INTENT IN BURGLARY—SUFFICIENCY OF THE EVIDENCE.—The defendant was indicted for breaking and entering a dwelling-house in the night-time with the intent to commit a public offense (to wit, an assault) there. The occupant testified that the defendant broke and entered the house through

a window, that he was badly intoxicated, and that after entering he staggered about the house and finally fell over against her and took hold of her arm. It appeared that the defendant had been on very friendly terms with the little son of the occupant and that he did request to see the son upon coming to the house on the night in question. Held, the evidence was not sufficient to establish the guilt of the defendant. *State* v. *Farrand,* 185 N. W. 586. (Iowa Sup. Ct.)

For discussion of the principles involved, see NOTES, *supra,* p. 254.

EQUITY—MISTAKE OF LAW AS GROUND FOR EQUITABLE RELIEF.—Plaintiff the lessor, and defendant, the lessee, of a hotel, agreed upon a modification of the lease providing that defendant pay a rental of two thousand dollars per month "and in addition thereto, one-third of the receipts for guest rooms in excess of two hundred dollars per day." Defendant seeks to avoid the modification on the ground that the parties signed it with different constructions in mind. Held, that the misconstruction of a contract is a mistake of law and would not entitle either party to equitable relief. *Lamson* v. *Horton Holdon Hotel Co.,* 185 N. W. 472 (Iowa Sup. Ct.).

As a matter of authority at the present time there is an almost universal recognition of the general rule, relied on in the instant case, that a mistake of law is not a sufficient ground for equitable relief. *Snell* v. *Atlantic Insurance Co.,* 98 U. S. 85; *Casady* v. *Woodbury County,* 13 Iowa 113. Equity has its well recognized standards for relief from burdensome contracts: fraud, accident, and *mistake of fact,* but has seen fit to draw the line when it comes to mistake of law. Several reasons are given by the modern courts in support of the distinction. It is said that the security of legal transactions demands that a written contract expressed in clear and unambiguous language, should be strictly enforced, *Heath* v. *Albrook,* 98 N. W. 619 (Iowa). This argument of policy, if carried to its logical conclusion, would lead to the exclusion of equitable relief on all other grounds as well. Moreover, it is said that equity should not make a contract for the parties that was not intended. *Dinwiddie* v. *Self,* 145 Ill. 290, 33 N. E. 892. Here again it would seem that all other grounds of relief are open to the same objection. More particularly it is said that persons of sound and mature mind are presumed to know the law and the legal effects of their acts. *Clark* v. *Lehigh Coal Co.,* 95 Atl. 462. This latter ground leads directly back to the historical origin of the distinction, which, to begin with, was the result of an implicit following of a chance authority. It was unknown prior to the nineteenth century. *Bize* v. *Dickason,* 1 T. R. 285. In *Bilbie* v. *Lumley,* 2 East 469, Lord Ellenborough held that money paid under mistake of law afforded no ground for equitable relief—a declaration based on the old maxim *"Ignorantia juris non excusat."* In that connection it should be recalled that Lord Ellenborough had been trained in the criminal law where the maxim does have

a proper application. However, in spite of a later decision to the contrary by the same judge, *Perrott* v. *Perrott,* 14 East 423, the common law took up the distinction as a rule of thumb and as such it has spread thruout England and the United States. Thus the courts today are applying a very vital distinction that was started by a judge who had been trained in the criminal law, and based upon a maxim that finds its true application only in that field. Jeremiah Smith, "Surviving Fictions," 27 Yale L. J., 317. Is it not a fair criticism that the very idea of "Ignorance of the law excuses no one" conveys the impression of justification for a wrong done; a party on the defensive, and that it has no application where, as in the present case, it is invoked as a basis for affirmative relief? Woodward, "Recovery of Money Paid Under Mistake of Law," 5 Columbia Law Rev. 336. Moreover, there are many instances where men are not held to a presumed knowledge of the law. KEENER, QUASI-CONTRACTS, p. 87.

The general rule has been encroached upon in decided cases. In *Hunt* v. *Rousmanier,* 8 Wheat. (U. S.) 174, it was held that where the mistake of law concerns the legal effect of a description of the subject matter or the import of technical words, it will be a ground for equitable relief. Acts by public officers under mistake of law will be relieved against. *Ely* v. *Board of Auditors,* 107 Mich. 528. The distinction is denied in favour of trustees. *Moulton* v. *Bennett,* 18 Wend. (N. Y.) 586. Where the mistake was highly material the Iowa Court has not hesitated to treat it as ground for equitable relief, even tho it was a mistake of law. *Bonbright* v. *Bonbright,* 123 Iowa 305; *Stafford* v. *Fetters,* 55 Iowa 484; *Coleman* v. *Coleman,* 153 Iowa 543. See also *Bottorf* v. *Lewis,* 121 Iowa 27, (private right parted with under mistake of law.) Several jurisdictions have openly refused to recognize the distinction. *Mansfield* v. *Lynch,* 59 Conn. 320; *Coudert* v. *Coudert,* 43 N. J. Eq. 407; *Louisville & N. R. Ry. Co.* v. *Commonwealth,* 89 Ky. 531. In California, Montana, and both Dakotas the distinction has been abolished by statute. *Gregory* v. *Clabrough's Executors,* 129 Cal. 475; WILLISTON, CONTRACTS, sec. 1581.

Even tho the distinction has become thoroly embedded in the law, yet because it was engrafted by a rather hasty decision which was later repudiated, because it is arbitrary as compared with the normal attitude of equity, and because it has been, during the past twenty-five years, subjected to considerable questioning, judicial as well as academic, it is submitted that its use should be restricted rather than encouraged; that, at least, it should be omitted as a basis of decision where the case can possibly be disposed of on other grounds.

The instant case is typical. On the particular facts the result is sound, but in meeting the complaint that the parties differed as to the construction, the court falls back on a lengthy discussion of mistakes of law. In the contract in question there was no fraud; the clause in question was unambiguous beyond a doubt; there was

involved no hidden meaning over which men could reasonably have differed. The interpretation of the clause was nothing more nor less than a matter of common understanding of English.

EVIDENCE—CONDITIONAL ADMISSIBILITY—ADMISSION OF STATEMENTS OF ALLEGED AGENT BEFORE AUTHORITY SHOWN.—In an action on an insurance policy, the plaintiff was permitted to testify over the objection of counsel for the insurance company that Mrs. Stanton, one of the authorized collectors, informed her that it would make no difference whether the premiums were paid on the first of the month or not. At that time it had not been shown that the agent was authorized to bind the principal by such statements. Held, that this evidence was admissible as bearing on the course of dealing between the parties, and was not inadmissible because the collector may not have been acting within the scope of her agency, for the plaintiff could not offer all of her testimony at one time; and, if subsequent developments destroyed the value of the evidence, the defendant should have moved to strike it out. No such motion was made. *Duncan* v. *Great Western Acc. Ins. Co.,* 185 N. W. 459 (Sup. Ct. of Iowa).

The general rule seems well established that the order of the introduction of evidence rests in the sound discretion of the trial court. 38 Cyc. 1350; DEEMER, IOWA PLEADING AND PRACTICE, Sec. 611; *State of Iowa* v. *Smith,* 129 Iowa 709, 712, 106 N. W. 187, 6 Ann. Cas. 1023, 4 L. R. A. (N. S.) 539; *Peterson* v. *Wood Mowing and Reaping Mach. Co.,* 97 Iowa 148, 152, 66 N. W. 96. And where evidence is offered which is not admissible at the time but may be made so by proof of other facts, the court may, on the professional statement of counsel that he will supply the other facts, admit such evidence conditionally, subject to being ruled out if the connecting evidence is not supplied. 26 R. C. L., Trial, Sec. 43; DEEMER, IOWA PLEADING AND PRACTICE, Sec. 628; *Dorn & McGinty* v. *Cooper,* 139 Iowa 742, 746, 117 N. W. 1, 118 N. W. 35, 16 Ann. Cas. 744. It has been held error for the trial court to refuse evidence that was irrelevant when offered, where counsel stated he would put in connecting evidence so as to make it relevant. *In re Estate of Goldthorp,* 94 Iowa 336, 346, 62 N. W. 845, 58 A. S. R. 400. But *Dorn & McGinty* v. *Cooper, supra,* places the matter entirely in the discretion of the court. Unless prejudice is shown, or the trial court has abused its discretion, the supreme court will not interfere with the exercise of that discretion. DEEMER, IOWA PLEADING AND PRACTICE, Sec. 628.

The rule as to conditional admissibility of evidence is generally the same in the agency cases as in other kind of cases. To be sure, the acts and statements of the agent cannot be made use of against the principal until the fact of the agency has been shown by other evidence. MECHEM, AGENCY, Sec. 285. The Iowa court has held that "before the declarations of an agent are admissible, the party offering to prove them must, at least, give some evidence tending to show that he had the power to act for his principal in relation

to the matter in hand, and that the same was within the scope of his authority." *Armil* v. *The Chicago, B. & Q. Ry. Co.,* 70 Iowa 130, 133, 30 N. W. 42; *Howell* v. *Mandelbaum & Sons,* 160 Iowa 119, 123, 140 N. W. 397. This ruling is somewhat qualified in a later case where relevancy of the proffered evidence depended upon proof of the authority of a corporate officer. A ruling excluding the evidence was upheld, but the supreme court stated that, in the discretion of the trial court, the evidence might have been received and proof of the authority received later on. *Overstreet* v. *New Nonpareil Co.,* 184 Iowa 485, 497, 167 N. W. 669. The order of proof upon this subject is usually within the discretion of the court, and the court may allow proof of the acts or statements in question before proof of the authority. 31 Cyc. 1670; *Betts* v. *Chicago, B. & Q. Ry. Co.,* 150 Iowa 252, 253, 129 N. W. 962; *Bullock* v. *Tompkin's Estate,* 125 Mich. 17, 83 N. W. 1029; *LaFayette Ry. Co.* v. *Tucker,* 124 Ala. 514, 27 So. 447. Respectable authority may be found, however, taking the contrary view that the agency is a preliminary fact to be shown before the acts and declarations of the alleged agent are to be admitted. *Matheron* v. *Ramina Corp.,* 194 Pac. (Cal.) 86; *The People* v. *Courson,* 87 Ill. App. 254, 255; *McDonald* v. *Lehigh Valley R. Co.,* 191 Ill. App. 628; *Williams* v. *Edwards,* 94 Mo. 447, 451; *Spencer* v. *Travelers' Ins. Co.,* 112 Mo. App. 86, 86 S. W. 899; *Brittain* v. *Westall,* 137 N. C. 30, 35; *Brigger* v. *Mutual Reserve Fund Life Ass'n,* 75 App. Div. (N. Y.) 149, 150. The Georgia Court of Appeal has recently said that the safer and better practice in all cases is to require proof of the agency before admitting declarations of the agent to impose liability on the principal. *Mackle Const. Co.* v. *Hotel Equipment Co.,* 102 S. E. (Ga. App.) 868.

As the court says in the principal case, all the evidence could not be presented at once. That, together with reasons of expediency in the presentation of evidence, makes necessary the rule of conditional admissibility. WIGMORE, EVIDENCE, Sec. 14. The opinion in the principal case does not indicate whether or not evidence was introduced later on to prove that Mrs. Stanton was acting within the scope of her agency when she made the statements to which appellant objected. Assuming that no such evidence was introduced, the doctrine of the court in the principal case that it would be incumbent upon appellant to move to strike the evidence from the record, if he wished to take advantage of the inadmissibility, would seem to place an undue burden upon the objecting party. The party offering the evidence is the one who has caused the error, and if the evidence is actually prejudicial his opponent should be entitled to a new trial without further objection. *Root* v. *K. C. S. Ry. Co.,* 195 Mo. 348, 376. At least it would seem that the opponent, though he fails to move to strike, should still be able to ask for an instruction that the jury should disregard this evidence. THOMPSON, TRIALS, Sec. 717. Yet, there are statements in Iowa cases that a motion to strike is required to secure the

exclusion of evidence conditionally admitted. *Dorn & McGinty* v. *Cooper, supra; State of Iowa* v. *Smith, supra.* Even in Iowa it seems that if the evidence conditionally admitted were highly prejudicial, a motion to strike or an instruction to disregard it would not cure the error, and the opponent would be entitled to a new trial. See *Croft* v. *Ry. Co.*, 134 Iowa 411, 420, 109 N. W. 723; *Robinson* v. *Cedar Rapids*, 100 Iowa 662, 664-665, 69 N. W. 1064; *Jones* v. *U. S. Mut. Acc. Ass'n*, 92 Iowa 652, 661-664, 61 N. W. 485.

INSURANCE—DELIVERY OF A LIFE-INSURANCE POLICY.—Insured, by secret agreement with defendant's agent, gave his note, payable to the agent, for the first premium. This was forbidden by the agent's contract with the company. The application provided that the policy was not to take effect until the first premium was paid and the policy delivered to and received by the insured during his lifetime and good health. When the agent went to deliver the policy he learned that insured had died of "flu" a few days before. He then returned the policy to defendant according to its rules and cancelled insured's note to himself. Held, the first premium was not paid, the policy was not delivered, and there can be no recovery on the policy. *Bradley* v. *New York Life Insurance Company*, 275 F. 657 (Iowa, 1921).

The physical act of handing the policy to the applicant is of legal importance in three ways: first, as a mere evidential fact; secondly, as an essential fact, that is to say, a means of communication; thirdly, as a condition precedent to the commencement of the risk. See Patterson, "The Delivery of a Life-Insurance Policy," 33 Harv. L. Rev. 198. At this time, when the life insurance contract has become so highly standardized by business custom and by statute, delivery of the policy does not have so much value evidentially. However, possession of the policy by the applicant gives rise to a presumption that the insurance contract has been formed. *Grier* v. *Mutual L. Ins. Co.*, 132 N. C. 542, 44 S. E. 28 (1903). On the other hand, if no policy has been delivered, that fact is *prima facie* evidence that no contract has been made. *Heiman* v. *The Phoenix Mutual L. Ins. Co.*, 17 Minn. 153 (1871).

As a means of communication, the majority of cases do not require actual communication to the insured. Manual delivery is not necessary. *New York L. Ins. Co.* v. *Babcock*, 104 Ga. 67, 30 S. E. 273 (1898); *Unterharnscheidt* v. *Missouri State L. Ins. Co.*, 160 Iowa 223, 138 N. W. 459 (1913). Indeed, it is generally agreed that the contract is complete when the policy, duly executed, reaches the local agent, provided all the conditions have been complied with, even though the policy is never delivered but is returned to the home office. *Payne* v. *Pacific Mutual L. Ins. Co.*, 141 Fed. 339 (1905); *New York L. Ins. Co.* v. *Pike*, 51 Colo. 238, 117 Pac. 899 (1911).

But when delivery to the insured is made a stipulation in the contract, a majority of the courts have strictly enforced such stipulation. *McCully's Administrator* v. *Phoenix Mutual L. Ins.*

Co., 18 W. Va. 782 (1881); *Missouri State L. Ins. Co.* v. *Burton*, 129 Ark. 137, 195 S. W. 371 (1917). Thus the principal case can be sustained on authority. It could also be sustained without such express stipulation in that the court found the first premium had not been paid. Other courts, however, have attempted to cut down the effect of these stipulations. They do so by finding that the insurance company had waived the benefit of the stipulation for delivery, *Rhodus* v. *Kansas City L. Ins. Co.*, 156 Mo. App. 281, 137 S. W. 907 (1911); or by calling a delivery to the local agent, *Gallagher* v. *Metropolitan L. Ins. Co.*, 67 Misc. 115, 121 N. Y. Supp. 638 (1910), or a mailing of the policy, *Triple Link Indemnity Association* v. *Williams*, 121 Ala. 138, 26 So. 19 (1898), delivery to the applicant. These decisions obviously stretch the clear meaning of language in order to alleviate the harsh effects of the stipulations.

Since the insured's obligation to pay premiums is fixed at the date of the application, the practical effect of enforcing such stipulations is to allow the insurance company to charge a premium for a period over which it gives no protection. On the other hand, if the applicant dies during that period before the local agent hands him the policy, then to give effect to the stipulation is to enforce a forfeiture. It is to be noted, too, that the company places the stipulation in the application which the applicant signs to constitute his "offer" to the company. Thus far the courts have not seen enough of the element of public policy involved for them to attack these stipulations directly. But if provision for others through life insurance is so beneficial to the individual and to the state,—and no life insurance company will deny that,—why should its beneficent influences be cut down by means of these stipulations, especially when such stipulations are unnecessary to safeguard the interests of the life insurance company?

MASTER AND SERVANT—WORKMEN'S COMPENSATION—INJURIES "ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT."—The plaintiff, a hotel chambermaid, used an alcohol lamp in her room, contrary to the hotel rules, for the purpose of heating her hair-curling iron. On returning to her room after a moment's absence, she discovered that the lamp had started a fire on her dresser, and while attempting to extinguish it, her clothing caught fire and she received severe burns for which she claimed compensation under the Act. Held, that these injuries were compensable as "arising out of and in the course of the employment" although occasioned by a lamp used contrary to the rules. *Kraft* v. *West Hotel Co.*, 185 N. W. 895 (Iowa Sup. Ct.).

Under the Iowa Workmen's Compensation Act, compensation is provided for "all personal injuries sustained by an employe arising out of and in the course of the employment." Code Supp. 1913 §2477m (a). It is further provided, however, that no compensation shall be allowed for an injury caused "by the employe's wilful intention to injure himself." Code Supp. 1913 §2477m1.

The instant case then raises a twofold question, namely: (1) When does an injury "arise out of" and "in the course of" the employment; and (2) how is the right to compensation affected by the employe's violation of the employer's rules?

The expressions "arising out of" and "in the course of" the employment are not synonymous terms. The words "arising out of" are construed to refer to the origin or the cause of the injury, while the words "in the course of" refer to the time, place, and the circumstances under which it occurred. *Fitzgerald* v. *Clarke,* (1908) 2 K. B. 796, 1 B. W. C. C. 197. The injury may be said to "arise out of" the employment when it is in some sense due to the employment—when it results from a risk reasonably incident to the employment and where there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Pace* v. *Appanoose County,* 184 Iowa 498, 168 N. W. 916; *Reid* v. *Washer Co.,* 179 N. W. 323 (Iowa). The injury may properly be said to arise "in the course of the employment" when it occurs within the period of employment at a place where the employe may be reasonably expected to be, and while he is reasonably fulfilling the duties of his employment or engaged in doing something incidental to it. *Pace* v. *Appanoose County, supra; Rish* v. *Cement Co.,* 186 Iowa 443, 170 N. W. 532. It certainly can be no exaggeration to say that it was the plaintiff's duty to put the fire out and save the hotel property and that her injuries resulted from a risk reasonably incident to the performance of that duty. The injury, therefore, may well be said to have arisen "out of and in the course of the employment" thus entitling the plaintiff to compensation unless barred by the violation of the hotel rules.

Under Section 2477m1 of Code Supp. 1913, *supra,* it would appear that compensation will not be barred by the mere fact that the employe is injured because of his own disregard of the employer's instructions, unless the instructions were purposely violated with an intention to injure himself. HONNOLD, WORKMEN'S COMPENSATION, p. 390. Some prohibitions, however, limit the sphere of employment and a violation of them, apart from the statutory provision, will take the employe "out of the course of employment" and prevent recovery of compensation. Other instructions merely regulate the conduct within the sphere of employment and a violation of them will not take the employe "out of the course of employment" and consequently will not bar recovery of compensation, unless, as above stated, the violation was intentional and for the purpose of producing injury. In the instant case, the hotel rule prohibiting the use of the lamp would seem to fall in the latter class; hence the plaintiff's violation of it would not prevent her recovery of compensation in the absence of proof of the intention to injure herself.

From an analysis of the purpose of the Act as well as from a consideration of the cases, it would appear that the result of the

immediate case is correct. The great object of the Act is to shift the burden of the economic loss, occasioned by injuries, from the employe to the industry in order that it may ultimately be borne by the consumer as a part of the necessary cost of production. *State* v. *Industrial Comm.*, 92 Ohio St. 434, 111 N. E. 299; *Peet* v. *Mills*, 76 Wash. 437, 136 Pac. 685. This purpose can only be promoted by a liberal construction of the provisions, and technical rules of interpretation must be to a great extent disregarded. *Rish* v. *Cement Co.*, 186 Iowa 443, 451, 170 N. W. 532. The Act is the modern substitute for the common law system which allowed injured workmen to recover in only a limited number of cases.

BOOK REVIEW

THE SPIRIT OF THE COMMON LAW. By Roscoe Pound, Dean of the Harvard Law School. (The Dartmouth Alumni Lectures, 1921). Boston; Marshall Jones & Co. 1921. Pp. xv, 224.

In an era of change and chance, when the fundamental faiths of the nineteenth century are being menaced from without the legal profession and doubted from within, it is cheering to hear one stalwart figure sounding the note of juristic optimism. The keynote of Dean Pound's brilliant little book is the essential soundness of the common law and its adaptability to the pressing problems of our complex social organization. The common law has, with few exceptions, triumphed over its chief rival, the Roman or civil law, wherever the two have come into competition; it has assimilated and made its own the competing systems developed in equity, admiralty and the law merchant; and the author doubts not that it will likewise assimilate the mass of modern social legislation and the new forms of executive justice.

Yet it must not be thought that Dean Pound favors preserving intact the particular rules and principles developed in our legal system during the nineteenth century. Many of these he regards as temporary, not eternal principles of justice; superficial, not vital to the common law. For example, the principle of "no liability without fault" must give way before irresistible social demands embodied in Workmen's Compensation Acts. The principle of "freedom of contract" must yield to the social interest in the individual human life, embodied in homestead statutes and legislation limiting hours of labor. To understand Mr. Pound's discussion, one must bear in mind that at the outset he defines the common law as "essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules."

After tracing, with masterly power of generalization, the four preceding stages in the development of law, he states that we are now entering upon a fifth, the stage of socialization of the law. This,

he hastens to assure the reader, does not mean "socialism," but merely recognition that individual interests must yield before the paramount demands of society as a whole. This leads to a brief discussion of sociological jurisprudence, in the final chapter. Here he gives a number of concrete examples of the way in which legal problems may be solved by taking account of the interests involved.

Eminent as lawyer, judge and law teacher, Dean Pound is well fitted to give a sound yet progressive interpretation of our legal system. The present volume is well worth the reading of any lawyer who has time to get away from the daily tasks of his office and view the law in its larger aspects.

E. W. P.

STATEMENT OF OWNERSHIP, MANAGEMENT, ETC., OF IOWA LAW BULLETIN

Published four times a year at Iowa City, Iowa. This notice required by the Act of Congress of August 24, 1912.
Editor-in-charge: EDWIN W. PATTERSON, Iowa City, Iowa.
Publisher: State University of Iowa, College of Law, Iowa City, Iowa.
Owners (if a corporation, give names and addresses of stockholders, holding 1 per cent or more of total amount of stock): State University of Iowa, Iowa City, Iowa.
Known bondholders, mortgagees, and other security holders, holding 1 per cent or more of total amount of bonds, mortgages, or other securities: None.

EDWIN W. PATTERSON, *Editor.*

Sworn to and subscribed before me this 27th day of March, 1922, by EDWIN W. PATTERSON, Editor.

E. REISENSTEIN,
Notary Public in and for Johnson County, Iowa.
(My commission expires July 4, 1924.)